TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~396~~. 113

THEODORE HANSEN, PLAINTIFF IN ERROR,

vs.

JAMES E. BOYD AND SAMUEL BOYD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED APRIL 22, 1893.

(15,026.)

In the year 1884.....	$1,643.84
" " " 1885.....	4,681.31
" " " 1886.....	2,911.19
" " " 1887, prior to August 1st.....	2,355.86
Total collected before August 9, 1887.....	$11,592.20

The collections after August 9th, 1887, were as follows:

In the year 1887, after August 1st.....	$881.72
" " " 1888.....	2,657.46
" " " 1889.....	1,207.73
Total since August 1, 1887.....	$4,746.91

It will thus be seen that the average date from which interest should be allowed, even upon the basis of annual instead of monthly settlements, would be prior to the date fixed by the Court in the decree appealed from.

W. L. Cole,
Attorney for Appellee.

161 U.S. 397

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~396~~. 113

THEODORE HANSEN, PLAINTIFF IN ERROR,

vs.

JAMES E. BOYD AND SAMUEL BOYD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED APRIL 22, 1892.

(15,026.)

(15,026.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 396.

THEODORE HANSEN, PLAINTIFF IN ERROR,

vs.

JAMES E. BOYD AND SAMUEL BOYD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

INDEX.

	Original.	Print.
Citation	1	1
Proof of service of citation	2	1
Writ of error	3	1
Return on writ of error	5	2
Bond on writ of error	6	2
Caption	9	4
Complaint	10	4
Summons	15	6
Marshal's return	16	7
Answer	18	7
Reply	24	10
Minute entry of trial	28	11
Minute entry of trial	30	12
Minute entry of trial	32	12
Minute entry of trial	34	13
Minute entry of trial	36	13
Verdict	38	14
Judgment	40	14
Petition for new trial	42	15
Order to file petition and granting stay	44	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1894.

	Original.	Print
Opinion denying motion for new trial	44*b*	16
Assignment of errors	48	18
Bill of exceptions	57	23
Statement of the case	57	23
Testimony of Charles E. Handy	62	26
Defendant's Exhibit 1-1—Account purchase and sale, August 25, 1888	70	33
1-2—Account purchase and sale, August 30, 1888	71	33
1-3—Account purchase and sale, September 1, 1888	71	33
1-4—Account purchase and sale, September 10, 1888	72	34
1-5—Account purchase and sale, October 6, 1888	72	34
1-6—Account purchase and sale, October 13, 1888	73	34
1-7—Account purchase and sale, November 3, 1888	73	35
1-8—Account purchase and sale, October 30, 1888	74	35
1-9—Account purchase and sale, November 15, 1888	74	35
1-10—Account purchase and sale, November 28, 1888	75	36
1-11—Account purchase and sale, January 31, 1889	75	36
1-12—Account purchase and sale, February 6, 1889	76	36
1-13—Account purchase and sale, February 6, 1889	77	37
1-14—Account purchase and sale, February 12, 1889	78	37
1-15—Account purchase and sale, February 14, 1889	78	37
1-16—Account purchase and sale, February 16, 1889	79	38
1-17—Account purchase and sale, April 29, 1889	79	38
1-18—Account purchase and sale, June 8, 1889	80	38
1-19—Account purchase and sale, June 10, 1889	81	39
1-20—Account purchase and sale, January 7, 1889	82	39
Defendant's Exhibit 2—Statement of account	84	40
Testimony of Charles E. Handy (cross)	84	40
Frank W. Teagard	90	45
James E. Boyd	107	60
Rules and by-laws of board of trade of Chicago	114	65
Regulations of Chicago board of trade clearing-house	129	75
Testimony of James E. Boyd (continued)	131	76
G. M. Brush	153	94

	Original.	Print
Exhibit L[1]—Letter, Hansen to Brush, April 8, 1889	154	94
M—Memorandum, April 29, 1889	155	95
3—Telegram, Boyd & Bro. to Hansen, April 29, 1889	157	96
4—Letter, Brush to Hansen, May 5, 1889	158	98
5—Letter, Brush to Hansen, March 19, 1889	159	98
6—Telegram, Boyd & Bro. to Hansen	165	102
Testimony of L. E. Murphy	166	103
H. E. Murphy	169	105
Edwin J. Noble	169	106
Defendant's Exhibit 6—Telegrams, Boyd & Bro. to Hansen	174	109
3—Telegram, Boyd & Bro. to Hansen, April 29, 1889	175	109
Plaintiffs' Exhibit C—Telegram, Brush to Murphy, April 29, 1889	175	110
M—Memorandum, April 29, 1889	175	110
Motion for verdict for defendant overruled	175	110
Statute of Illinois	176	110
Testimony of Theodore Hansen	177	111
Exhibit H[9]—Letter, Hansen to Handy, December 2, 1888	197	128
H[14]—Letter, Hansen to Boyd & Bro., May 17, 1889	199	129
Testimony of George E. Kirkbride	208	135
L. E. Murphy (recalled)	211	137
Charge to jury	214	139
Exceptions to charge	225	146
Judge's certificate to bill of exceptions	234	151
Clerk's certificate	235	152

1 UNITED STATES OF AMERICA, *ss:*

To James E. Boyd and Samuel Boyd, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein Theodore Hansen is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of December, A. D. 1890.

R. R. NELSON, *Judge.*

2 [Endorsed:] Ent. D. Law. 632. U. S. circuit court, dist. of Minnesota. James E. Boyd and Samuel Boyd, plaintiffs, *vs.* Theodore Hansen, def't. Citation. Original. Personal service of the within citation is admitted this 11th day of December, 1890. Ralph Whelan & D. M. Kirton, pl'ffs' att'ys. Flandrau, Squires & Cutcheon, attorneys, St. Paul, Minn. Filed Dec. 11th, 1890. Oscar B. Hillis, clerk.

3 & 4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between James E. Boyd and Samuel Boyd, plaintiffs, and Theodore Hansen, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeding- aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of December, in the year of our Lord one thousand eight hundred and ninety, and

of the Independence of the United States *of* the one hundred and fourteenth.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

[Endorsed:] Ent. D. Law. 632. U. S. Supreme Court. Theodore Hansen, pl'ff in error, *vs.* Jas. E. Boyd & Samuel Boyd, def'ts in error. Writ of error. Original. Personal service of the within writ of error is admitted this 11th day of December, 1890. Ralph Whelan & D. M. Kirton, pl'ffs' att'ys. Filed Dec. 11th, 1890. Oscar B. Hillis, clerk. Flandrau, Squires & Cutcheon, attorneys, St. Paul, Minn.

5 UNITED STATES OF AMERICA, *District of Minnesota,* } *ss.*:

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.

In witness whereof I hereto subscribe my name and affix the seal of the circuit court of the United States for the district of Minnesota, third division.

OSCAR B. HILLIS,
Clerk of the U. S. Circuit Court,
By LOUISE B. TROTT, *Deputy.*

6 Know all men by these presents that *I*, Theodore Hansen, principal, and Herman W. Stone and Arnold D. Aldrich, ans Luther R. Aldrich and Albert N. Johnson, as sureties, are held and firmly bound unto James E. Boyd and Samuel Boyd in the full sum of twenty-seven thousand dollars ($27,000.00), to be paid to the said James E. Boyd and Samuel Boyd, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of December, A. D. 1890.

Whereas at a late general term of the circuit court of the United States for the district of Minnesota, begun and held at the city of St. Paul, in said district, on the 9th day of December, 1889, and upon the 12th day of February, 1890, in said term, in a suit depending in the said circuit court between the aforesaid James E. Boyd and Samuel Boyd, plaintiffs, and the said Theodore Hansen, defendant, judgment was rendered against the said defendant for the sum of $19,099.50, and the said Theodore Hansen, as such defendant as aforesaid, having obtained a writ of error and filed a copy thereof in the office of the clerk of said circuit court, and a citation directed to the said James E. Boyd and Samuel Boyd, citing and admonishing them to be and appear at a Supreme Court of the

United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Theodore Hansen shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make his
7 plea good, then this obligation to be void; else to remain in in full force and effect.

THEODORE HANSEN. [SEAL.]
HERMAN W. STONE. [SEAL.]
ARNOLD B. ALDRICH. [SEAL.]
LUTHER R. ALDRICH. [SEAL.]
ALBERT N. JOHNSON. [SEAL.]

Sealed and delivered in presence of—
J. N. EDWARDS.
MAGNUS PEDERSON.
HANS LOTGAARD.
E. R. ALDRICH.

STATE OF MINNESOTA, } ss:
County of Swift, }

On this ninth day of December, 1890, before me personally appeared Theodore Hansen, Herman W. Stone, Arnold D. Aldrich, Luther R. Aldrich, and Albert N. Johnson, to me known to be the persons described in and who executed the annexed and foregoing instrument, and acknowledged that they executed the same as their free act and deed.

J. N. EDWARDS,
[NOTARIAL SEAL.] *Notary Public, Swift Co., Minn.*

DISTRICT OF MINNESOTA, } ss:
County of Swift, }

Be it known that on this ninth day of December, A. D. 1890, personally came Herman W. Stone, Arnold D. Aldrich, Luther R. Aldrich, and Albert N. Johnson, the sureties named in the foregoing bond, and, being duly sworn, each for himself did depose and say that he is a resident and freeholder within the State of Minnesota, and is worth the sum of ten thousand dollars over and above all debts and liabilities and exclusive of property exempt from execution.

8 HERMAN W. STONE. [SEAL.]
ARNOLD D. ALDRICH. [SEAL.]
LUTHER R. ALDRICH. [SEAL.]
ALBERT N. JOHNSON. [SEAL.]

Subscribed and sworn to before me this ninth day of December, A. D. 1890.

J. N. EDWARDS,
[NOTARIAL SEAL.] *Notary Public, Swift County, Minnesota.*

(Endorsed:) Supersedeas bond. I hereby approve the within bond of supersedeas and the sufficiency of the sureties thereto.

R. R. Nelson, judge. Dated Dec. 10th, 1890. Filed December 11th, 1890. Oscar B. Hillis, clerk.

Personal service of the within supersedeas bond is admitted this 11th day of December, 1890.

RALPH WHELAN AND
D. M. KIRTON,
Plff's' Att'ys.

9 UNITED STATES OF AMERICA:

JAMES E. BOYD and SAMUEL BOYD
vs.
THEODORE HANSON.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the December term, A. D. 1889, of said court, held in the city of St. Paul, in said district, in the year 1890.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on the 11th day of June, 1889, came the plaintiffs, by their attorneys, and filed their complaint in the office of the clerk of the United States circuit court, in words and figures as follows:

10 UNITED STATES OF AMERICA,
District of Minnesota.

In the Circuit Court of the —, — Term, A. D. 1889.

JAMES E. BOYD and SAMUEL BOYD
vs.
THEODORE HANSEN. } Complaint.

Fol. 1.

James E. Boyd and Samuel Boyd, who are each citizens of the State of Illinois, the plaintiffs in the above-entitled action, by Ralph Whelan and D. M. Kirton, their attorneys, complaint of Theodore Hansen, who is a citizen of the State of Minnesota, the defendant in the above-entitled action, and respectively show to the court:

That during all the times hereinafter mentioned said plaintiffs were and still are copartners in trade under the firm name and style of James E. Body and Brother and engaged in business in the city of Chicago, in said State of Illinois.

Fol. 2.

That between the 24th day of August, A. D. 1888, and the 8th day of June, A. D. 1888, said plaintiffs, at the special instance and request of said defendant, paid, laid out, and expended for the use of said defendant, on account of the purchase and sale of certain grain made at the like special instance and request of said defendant, in said city of Chicago, the sum of seventeen thousand five hundred ninety-eight and $\frac{36}{100}$ dollars ($17,598.36).

11 That, by reason thereof, said defendant became indebted unto said plaintiffs in said sum of seventeen thousand five hundred ninety-eight and $\frac{36}{100}$ dollars ($17,598.36).

That sum and every part thereof is due and unpaid.

That said defendant, although often requested so to do, has hitherto refused and does still refuse to pay (fol. 3) unto said plaintiffs said sum or any part thereof, to the damage of said plaintiffs of seventeen thousand five hundred ninety-eight and $\frac{36}{100}$ ($17,598.36) dollars.

And, for a second cause of action, said plaintiffs, repeating all and singular the allegations of folio 1 herein and referring to and making the same a part of this cause of action, do further allege and show to the court:

That between the 24th day of August, A. D. 1888, and the 8th day of June, A. D. 1889, at said city of Chicago, said State of Illinois, said plaintiffs, at the special instance and request of said defendant, performed certain work and labor and bestowed certain care and diligence, as the factors or agents of said defendant, in and about the buying, selling, and disposing of divers goods, wears, and merchandise, to wit, grain, for (fol. 4) and of said defendant, and also in doing and transacting others the business of said defendant for him and at his like special instance and request; that said work and labor, care and diligence, so performed and bestowed as aforesaid, were reasonably worth the sum of six hundred and fifty (650) dollars; that said defendant faithfully promised unto said plaintiffs to pay unto them for said work and labor, care and dili-

12 gence, so performed and bestowed as aforesaid, the said sum of six hundred and fifty ($650) dollars, and by reason thereof became indebted to said plaintiffs in said sum.

That said sum and every part thereof is due and unpaid; that said defendant, although often requested so to do, has (fol. 5) hitherto refused and does still refuse to pay unto said plaintiffs said sum or any part thereof, to the further damage of said plaintiffs of six hundred and fifty ($650) dollars.

Wherefore said plaintiffs demand judgment against said defendant for the sum of eighteen thousand two hundred forty-eight and $\frac{36}{100}$ ($18,248.36) dollars and interest thereon from the 8th day of June, A. D. 1889, besides their costs and disbursements of this action.

(Signed) RALPH WHELAN AND
D. M. KIRTON,
Attorneys for Plaintiff, 350 *Temple Court*,
Minneapolis, Minn.

Dated Minneapolis, June 11th, A. D. 1889.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Personally came before me George M. Brush, who, being by me duly sworn, deposes and says that he resides in the city of Minneapolis, in said county and State; that he is the duly authorized

agent of said plaintiffs, James E. Boyd and Samuel Boyd, copartners as James E. Boyd and Brother; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true to the best of his knowledge, information, and belief,
13 and that the reason why this verification is not made by said plaintiffs or one of them is that they and each of them are absent from the county of Hennepin, State of Minnesota, wherein resides this deponent.

GEORGE M. BRUSH.

Subscribed and sworn to before me this 11th day of June, A. D. 1889.

RALPH WHELAN,
[NOTARIAL SEAL.] *Notary Public, Hennepin Co., Minn.*

Endorsed: Complaint. Filed June 11, 1889. Oscar B. Hillis clerk.

14 And on the same day the following summons was issued, the same was returned by marshal and filed of record in *da*is cause on the 22nd day of June, 1889.

15 (Original.)

UNITED STATES OF AMERICA.

DISTRICT OF MINNESOTA, } *ss:*
Third Division, }

In the Circuit Court of the United States for the District of Minnesota.

JAMES E. BOYD and SAMUEL BOYD } Summons.
against
THEODORE HANSEN. }

The President of the United States of America to the defendant above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey and State of Minnesota, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will take judgment against you for the sum of eighteen thousand two hundred forty-eight and $\frac{36}{100}$ dollars ($18,248.36) and interest thereon from June 8th, 1889, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 11th day of June,

A. D. 1889. Issued at my office, in the city of St. Paul, under the seal of said circuit court, the day and year last aforesaid.

[SEAL OF COURT.] OSCAR B. HILLIS, *Clerk*,
By —— ——, *Deputy*.

RALPH WHELAN AND D. M. KIRTON,
Plaintiffs' Attorneys.

16 UNITED STATES OF AMERICA, }
District of Minnesota, } *ss*:

I hereby certify and return that I have served the annexed summons on the therein-named Theodore Hansen by handing to and leaving with him a true and correct copy thereof personally at Benson, in said district, on the 12th day of June, 1889.

W. M. CAMPBELL,
U. S. Marshal,
By J. A. CAMPBELL, *Deputy*.

Marshal's fees, $12.40.

Endorsed: Summons. Filed June 22nd, 1889. Oscar B. Hillis, clerk.

17 And on the 2nd day of July the following answer was filed of record in said cause, to wit:

18 UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court of the Term, A. D. 1889.

JAMES E. BOYD and SAMUEL BOYD }
against }
THEODORE HANSEN. }

The defendant, answering to the plaintiffs' complaint in the action above entitled, makes answer thereto and the two several and separate causes of action therein, states as follows:

I.

This defendant admits the several residence of all the respective parties and the partnership of the plaintiffs as alleged in the complaint.

II.

The defendant, further answering to the first pretended cause of action stated in the complaint, alleges and charges the facts to be that during all the time (fol. 1) mentioned in said first pretended cause of action the plaintiffs were brokers, dealers, and gamblers in "future" and option deals in wheat and other grains at said city of Chicago.

That at various times from said 24th day of August, 1888, to the 8th day of June, 1889, this defendant contracted with and employed

said plaintiffs to buy and sell for this defendant at the said city of Chicago not actual wheat but wheat options or futures so called for divers months during the time last aforesaid and extending to
19 May, 1889, and said plaintiffs, so contracted with and employed, did buy and sell for this defendant at said city of Chicago for said divers months said (fol. 2) wheat options or futures; that in said buying and selling as aforesaid of said wheat options or futures it was understood and the agreement was by and between this defendant and the plaintiffs and those with whom the plaintiffs dealt on behalf of the defendant in said deals in wheat options and futures that there was to be no actual sales and delivery of actual wheat in any case, and the purchase or delivery of actual wheat was never intended nor contemplated by any of said parties, but it was understood and the agreement was by and between all of said parties, this defendant, the said plaintiffs, and all those with whom said plaintiffs dealt (fol. 3) on behalf of this defendant in said wheat options and future deals, that the settlement was to be made between said parties and all losses and gains adjusted between them by one party paying to the other the difference in values between the contract price or price at which said wheat options or futures were bought and the market price of said wheat options or futures according to the fluctuations in the market, and therefore the defendant says that said contracts and transactions were wagering contracts and wagering transactions and acts and wagers on the price of wheat and were so understood and intended by all the parties thereto (fol. 4), and that said sum of seventeen thousand five hundred and ninety-eight and $\frac{36}{100}$ dollars ($17,598.36) alleged in said complaint to have been paid, laid out, and expended by the plaintiffs for the use of the defendant on account of the pur-
20 chase and sale of certain grain made at said city of Chicago by the plaintiffs for the defendant was knowingly lent and advanced at the time and place of such gambling and betting by the plaintiffs to the defendant at the city of Chicago, in the State of Illinois, in buying for this defendant said wheat options and futures, as hereinbefore stated, and carrying the same on his, this defendant's, account (fol. 5), and were at said time and times prohibited and declared illegal and void by the statutes of said State of Illinois, to wit: Section one hundred thirty (130), of chapter thirty eight (38), of the Revised Statutes of 1881, and by sections 131, of the same chapter, all promises, contracts, covenants, and agreements, and other obligations for the payment of money where the whole or any part of the consideration shall be for money, property, or other valuable thing were, by any gaming, betting, or wager on any lot, chance, casualty, or unknown or contingent event, or other thing whatsoever, prohibited in said section 130, or for the reimbursing or paying any money (fol. 6) or property knowingly lent or advanced at the time of such play or bet to any person or persons so gaming or betting, or that shall be lent or advanced during such play or betting, shall be void and of no effect; and, except as hereinbefore stated, this defendant denies that said plaintiffs paid, laid out, or expended any money or other valuable thing whatsoever for

the use of this defendant on account of the purchase and sale of certain grain or any grain whatsoever at the city of Chicago or elsewhere, and alleges and charges the fact to be that the transactions, acts, and things in that behalf in said first pretended cause of action in (fol. 7) said complaint alleged are the same trans-
21 actions, acts, and things in this answer hereinbefore alleged and stated, to wit, the buying and selling options and futures in wheat on this defendant's account and carrying the same on this defendant's account and lending and advancing money to this defendant for that purpose at the time and place and in the manner hereinbefore stated.

And this defendant, answering to the second pretended cause of action in said complaint, denies that said plaintiff-, at defendant's request or otherwise, performed certain or any — the work, or bestowed any — the care or diligence as the factors or agents of this defendant, or in any manner in or about the buying, selling, or disposing of divers or any goods (fol. 8), wares, or merchandise, or of any grain for or of said defendant, or in doing or transacting any other the business of said defendant other than and except in buying, selling, and dealing in said wheat options and futures and applying this defendant's money and property to a large amount, to wit, the sum and amount of eleven thousand dollars, in paying losses suffered and paid by said defendant on said betting and gambling in said buying and selling of wheat options and futures by plaintiffs for this defendant, as hereinbefore in this answer to the first pretended cause of action in said complaint stated, all of which (fol. 9) was at the time knowingly done by plaintiffs, and was prohibited by said laws of the State of Illinois hereinbefore in this answer cited.

And as to each and every other allegation in said complaint contained not hereinbefore expressly admitted or denied the defendant denies the same.

22 Wherefore the defendant prays the judgment of this court for his costs and disbursements in this behalf incurred.

WM. S. MOORE,
Defendant's Attorney, Room 33 Wilder Block,
St. Paul, Minnesota.

STATE OF MINNESOTA, }
County of Ramsey. }

Wm. S. Moore came before me personally and, being duly sworn, doth say that he is the defendant's attorney in the above-entitled action; that the foregoing answer is true, to the best of his knowledge, information, and belief, and that the reason why this verification is not made by said defendant is that said defendant is absent from the county of Ramsey, Minnesota, where resides this affiant, said defendant's attorney.

WM. S. MOORE.

Subscribed and sworn to before me on this 2nd day of July, A. D. 1889.

EDWARD G. B. HENRY,
Notary Public, Ramsey County, Minnesota.

(Endorsed:) Answer. Filed July 2nd, 1889. Oscar B. Hillis, clerk.

And on the 16th day of July, 1889, the following reply was filed of record in said cause, to wit:

UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court of the —, — Term, A. D. 1889.

JAMES E. BOYD and SAMUEL BOYD }
vs. } Reply.
THEODORE HANSEN. }

Come now the plaintiffs, James E. Boyd and Samuel Boyd, and reply make unto the answer herein of the said defendant, Theodore Hansen:

1st. Said plaintiffs and each of them do deny all that part and portion of said answer commencing at paragraph 11 and folio one (1) of said answer with the words "The defendant, further answering to the first pretended cause of action stated in the complaint, alleges and charges the facts to be that during all the time," &c., extending thence and including every part and portion of said answer up to, inclusive of, and ending with the words "and lending and advancing money to this defendant for that purpose a- the time and place and in the manner hereinbefore stated," in folio seven (7) of said answer, and each and every allegation, matter, and thing in said portion of said answer contained.

2nd. And, further replying, said plaintiffs and each of them do deny all that part and portion of said answer commencing at and in folio seven (7) thereof with the words "And this defendant, answering to the second pretended cause of action in said complaint," &c., extending thence and including every part and portion of said answer up to, inclusive of, and ending with the words "and
25 was prohibited by said laws of the State of Illinois hereinbefore in this answer cited," in folio nine (9) of said answer, and each and every allegation, matter, and thing in said portion of said answer contained.

Wherefore said plaintiffs and each of them pray as in their complaint herein.

Dated Minneapolis, July 15, 1889.

RALPH WHELAN AND
D. M. KIRTON,
Attorneys for Plaintiffs, 350 Temple Court, Minneapolis, Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Personally came before me George N. Brush, who, being by me duly sworn, deposes and says that he resides in the city of Minneapolis, in said county and State; that he is the duly authenticated agent of said plaintiffs, James E. Boyd and Samuel Boyd, copartners as James E. Boyd and Brothers; that he has heard read the foregoing reply and knows the contents thereof; that the same is true to the best of his knowledge, information, and belief, and that the reason why this verification is not made by said plaintiffs or one of them is that they and each of them are absent from the county of Hennepin, State of Minnesota, wherein resides this deponent.

GEO. M. BRUSH.

Subscribed and sworn to before me on this 16th day of July, A. D. 1889.

[NOTARIAL SEAL.] RALPH WHELAN,
Notary Public, Hennepin County, Minnesota.

26 (Endorsed:) Reply. Filed July 16, 1889. Oscar B. Hillis, clerk.

27 And on Feb'y 4th, 1890, the following proceeding of court was entered of record in said cause, viz:

28 United States Circuit Court for the District of Minnesota.

Term minutes, Dec. term, A. D. 1889.

FEB. 4TH, 1890.

JAMES E. BOYD *et al.*
vs.
THEODORE HANSEN. } D. Law. 632.

This cause being regularly called for trial, the plaintiffs appear by their attorneys, Ralph Whelan and D. M. Kirton and C. D. O'Brien, and the defendant by his attorney, William S. Moore.

Whereupon, upon motion of plaintiffs' said attorneys, it is ordered that a jury come, to wit:

Giles A. Baker, Nicholas Hardy, E. B. Eldred, Thos. Dunn, Adan Finck, F. X. Brosseau, Emory A. Weller, James O'Brien, Chas. Trowbridge, George A. Wells, Vesper Morgan, Geo. W. Riddle, twelve good and lawful men, who are duly sworn to try the issues joined herein, and the trial of said cause is proceeded with as follows:

D. M. Kirton opens the case for the plaintiffs.

Deposition of E. J. Noble is read in evidence on behalf of the plaintiffs.

W. T. Gardener is sworn and examined on behalf of the plaintiffs.

James E. Boyd is sworn and examined on behalf of plaintiffs.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and hey are hereby, postponed until tomorrow morning at 10 o'clock.

29 And on the 5th day of Feb'y the following proceeding of court was entered of record in said cause, viz:

30 United States Circuit Court for the District of Minnesota.

Term minutes, Dec. term, A. D. 1889.

FEB. 5, 1890.

JAMES E. BOYD *et al.*
vs.
THEODORE HANSEN. } D. Law 632.

This day again come the parties herein, by their respective attorneys; also the jury sworn to try said cause, and the further trial of the same is proceeded with as follows:

James E. Boyd is recalled and further examined on behalf of the plaintiffs.

H. A. Tuttle is sworn and examined on behalf of plaintiffs.

Charles E. Handy is sworn and examined on behalf of plaintiffs.

George N. Brush is sworn and examined on behalf of plaintiffs.

George N. Brush is also examined as a witness for defendant.

H. E. Murphy is sworn and examined on behalf of plaintiffs.

L. E. Murphy is sworn and examined on behalf of plaintiffs.

And here the plaintiffs rest.

Thereupon defendant's attorney moves the court to instruct the jury to find and return into court a verdict for the defendant, and said motion being duly argued by the attorneys for the respective parties, and the court, being fully advised in the premises, overrules and denies the same.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and the same are hereby, postponed until tomorrow morning at 10 o'clock.

31 And on the 6th day of Feb'y the following proceeding of court was entered of record in said cause, viz:

32 United States Circuit Court for the District of Minnesota.

Term minutes, Dec. term, A. D. 1889.

FEB. 6TH, 1890.

JAMES E. BOYD *et al.*
vs.
THEODORE HANSEN. } D. Law. 632.

This day again come the parties herein, by their respective attorneys, also the jury sworn to try this cause, and the further trial of the same is proceeded with as follows:

Certain rules of the Chicago board of trade are read in evidence on behalf of plaintiffs.

And here the plaintiffs rest.

W. S. Moore opens the case for the defendant.

Theodore Hansen is sworn and examined on his own behalf.

And here the defendant rests.

George W. Kirkbride is sworn and examined on behalf of plaintiffs.

L. E. Murphy is recalled and further examined on behalf of plaintiffs.

And here the plaintiffs again rest.

W. S. Moore sums up the case for the defendant.

D. M. Kirton sums up the case for the plaintiffs.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until tomorrow morning at 10 o'clock.

33 And on the 8th day of Febr'y the following proceeding was entered of record in said cause:

34 United States Circuit Court for the District of Minnesota.

Term minutes, Dec. term, A. D. 1889.

FEB. 7TH, 1890.

JAMES E. BOYD and SAMUEL BOYD
vs.
THEODORE HANSEN. } D. Law. 632.

This day again come the parties herein, by their respective attorney-; also the jury sworn to try this cause.

The court charges the jury with the instruction, given pursuant to agreement by the attorneys for the respective parties, that if they agree upon a verdict before the incoming of the court tomorrow morning they shall place the same under seal and return it into court by their foreman.

Thereupon they retire to consider of their verdict.

John C. Flynn is sworn as bailiff to take charge of the jury.

Ordered that if necessary the marshal furnish the jurors with their meals.

35 And on the 8th day of Feb'y the following proceeding of court was entered of record in said cause, viz:

36 United States Circuit Court for the District of Minnesota.

Term minutes, Dec. term, A. D. 1889.

FEB. 8TH, 1890.

JAMES E. BOYD and SAMUEL BOYD
vs.
THEODORE HANSEN. } D. L. 632.

The jury sworn to try this cause, having been duly charged by the court and heretofore retired to consider of their verdict—

Now, after due consideration concerning the same and being fully advised in the premises, find and return into court by their foreman their verdict in words and figures as follows:

"We, the jury in the above-entitled action, find for the plaintiffs and assess their damages at the sum of nineteen thousand and ninety-nine and $\frac{50}{100}$ dollars ($19,099.50).

THOMAS DUNN, *Foreman.*"

Pursuant to agreement of the attorneys for the respective parties, made in open court, it is ordered that the entry of judgment upon the above verdict be, and the same is hereby, stayed for a period of 20 days from date hereof.

37 And on the same day the following verdict was filed of record in said cause, to wit:

38 UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court.

JAMES E. BOYD and SAMUEL BOYD, Plaintiffs, }
against }
THEODORE HANSEN, Defendant. }

We, the jury in the above-entitled action, find for -he plaintiffs and assess their damages at the sum of nineteen thousand and ninety-nine and $\frac{50}{100}$ dollars ($19,099.50).

THOS. DUNN, *Foreman.*

(Endorsed:) Verdict for plaintiff ($19,099.50). Filed Feb'y 8th, 1890. Oscar B. Hillis, clerk.

39 And on the 12th day of Feb'y the following proceeding of court was entered of record in said court, viz:

40 United States Circuit Court for the District of Minnesota.

Term minutes, Dec. term, A. D. 1889.

FEB. 12TH, 1890.

JAMES E. BOYD and SAMUEL BOYD }
vs. } D. Law. 632.
THEODORE HANSEN. }

This day again come the parties herein, by their respective attorneys, and, pursuant to agreement of said attorneys, made in open court, it is ordered that the stay of entry of judgment heretofore entered herein be, and the same is hereby, set aside.

It is therefore considered, ordered, and adjudged that the above-named plaintiffs do have and recover of and from the above-named defendant the sum of nineteen thousand ninety-nine and $\frac{50}{100}$ dollars ($19,099.50), being the amount of the verdict herein, besides their costs and disbursements herein, to be taxed, and that they have execution therefore.

Thereupon, upon motion of defendant's attorney, it is ordered that execution be, and the same is hereby, stayed for a period of 42 days from date hereof.

Judgment-roll signed this 12th day of February, 1890.

OSCAR B. HILLIS, *Clerk.*

Amount of judgment, $19,099.50.

(Endorsed:) Judgment-roll. Filed Feb'y 12th, 1890. Oscar B. Hillis, clerk.

41 And on the 25th day of March the following petition for a new trial and judge's order thereon was filed of record in said cause, to wit:

42 Circuit Court of the United States, District of Minnesota.

JAMES E. BOYD and SAMUEL BOYD, Plaintiffs,
against
THEODORE HANSEN.

To the honorable the circuit court of the United States for the district of Minnesota and the judges thereof:

The defendant in the above-entitled action respectfully petitioned this honorable court and the judges thereof for a new trial in said action upon the following grounds:

1. The verdict and judgment in said action are not nor is either of them justified by the evidence, and they are both contrary to law.

2. Errors in law occurring at the trial and excepted to by the defendant.

3. That the judge who tried the cause should have instructed the jury to find a verdict for the defendant or should have dismissed the cause.

4. For errors in the charge of the judge who tried the cause to the jury, excepted to by the defendant, and for divers other grounds of error appearing in the record of said cause, and the case or bill of exceptions, which is hereby made a part of this petition.

43 Said motion will be made and founded upon this petition, the stenographer's minutes, and transcript of the evidence, with the deposition- of E. J. Noble, Robert Prindle, and Chas. R. Barrett and the exhibits therewith, and all other the exhibits introduced in evidence on the trial of said cause, together with the settled case or bill of exceptions, all of which will be read on said motion by defendant's counsel in support of the same.

WM. S. MOORE,
Attorney for the Defendant.

DISTRICT OF MINNESOTA, *ss:*

Wm. S. Moore, being first duly sworn, deposes and says that he is attorney for the defendant in the above-entitled action; that the

foregoing petition is true and is made in good faith and not for the purpose of delay.

WM. S. MOORE.

Subscribed and sworn to before me this 22nd day of March, A. D. 1890.

[NOTARIAL SEAL.] M. M. WACKENHEIMER,
Notary Public, Ramsey County, Minnesota.

44 Circuit Court of the United States, District of Minnesota.

JAMES BOYD and SAMUEL BOYD
against
THEODORE HANSEN.

December Term, 1889.

Present: Hon. R. R. Nelson, judge.

I hereby certify that I have read the forgoing petition for a new trial made by the defendant in the above entitled action and I allow the same to be filed in said action in this court; and further proceedings on the judgment in said action are hereby stayed until said motion is hear- and determined.

R. R. NELSON, *Judge.*

(Endorsed:) Defendant's petition for a new trial and judge's order thereon. Filed March 25th, 1890. Oscar B. Hillis, clerk.

44*a* And on the 5th day of December, 1890, the following opinion denying the motion for a new trial was filed of record in said cause, to wit:

44*b* United States Circuit Court, District of Minnesota, December, 1890.

JAMES E. BOYD *et al.*
vs.
THEODORE HANSEN.

Ralph Whelan & D. M. Kirton, plaintiffs' attorneys.
Wm. S. Moore, defendant's attorney.

Motion for a New Trial.

Memorandum.

NELSON, *J.:*

The chief question presented by this motion arises upon the char acter of the wheat transactions or contracts involved in the suit, and it is strenuously urged that the evidence conclusively shows that it was not the intention of the parties to the contracts that any wheat should be delivered or paid for, and that the sales were fictitious and to be settled upon differences—a mere gambling upon the fluctuation of prices.

The evidence was somewhat conflicting, but it was fairly left to the jury to determine the intention of the parties and the law correctly given by the court.

The jury found that it was the *bona fide* intention in all cases either of the seller to deliver or the buyer to pay, and that the option related merely to the time of delivery within a given time.

44c It is true, margins were called for and put up to cover losses which might occur from fluctuation of prices, and the final settlement of the transactions *were* to be made according to certain usages and rules of the Chicago board of trade; but there is nothing illegal or improper in so doing, provided the original contract itself is lawful, which the jury by their verdict found.

Cases of this kind depend largely upon the intention of the parties at the time the contracts are made, and present questions peculiarly within the province of a jury to determine.

The charge of the court stated fairly the question for the jury to decide, and the only request for instruction asked by the defendant was given verbatim. It is urged that the jury were misled by a statement in the charge that the word "scalps," used by the agent of the defendants before the defendant authorized him to enter into any contracts for the purchase or sale of wheat, mislead the jury.

Hansen, the defendant, testified, in substance, that in the latter part of July, 1888, the manager of the plaintiff at Minneapolis was introduced to him by a Mr. George Shepherd, who said, "I used to have a few deals in options, and when I was trading with him I had never made a loss," and that the next day after the introduction the manager spoke to him in the Chamber of Commerce building, in Minneapolis, and said that "he knew I had some trades a year ago, and they had roasted me pretty hard then, but he thought it was a good chance to make something back this fall by making some 'scalps.'" On cross-examination, witness, on being asked "What do you mean by the word 'scalps?'" said the word was used

44d on exchange frequently when they mean "taking a short time, buy and sell as quick as you see a profit, and when you have a loss close it out at any moment." "A scalp means a short deal."

The meaning of the word is not fully disclosed by this testimony, nor is it revealed by the answer to a question of the court, when the witness in substance said that an example of a "scalp" was when a dealer having previously bought wheat to be delivered in May sold the same quantity to be delivered the same month and settled his deals before May. I do not think any substantial error was committed in view of such evidence.

The verdict was justified by the evidence, and in regard to the claim made that at the time the suit was commenced the plaintiffs had not paid the loss on sales of 40,000 bushels of June wheat and 25,000 bushels of July wheat.

I think it is a reasonable conclusion from the testimony, and particularly the evidence of Boyd, Murphy, and defendant, that before the suit was commenced the defendant knew the loss had occurred,

and that it resulted from transactions in wheat deals authorized by him or ratified by him, and that the plaintiffs had paid the loss.

Motion for a new trial denied.

(Endorsed:) Opinion denying motion for new trial. Filed Dec. 5, 1890. Oscar B. Hillis, clerk.

45, 46, & 47 And on the 3rd day of March, 1892, the following assignment of errors was filed of record in said cause, to wit:

48 Circuit Court of the United States, District of Minnesota.

JAMES E. BOYD *et al.*
vs.
THEODORE HANSEN.

Assignments of Errors.

And now comes the said defendant, by William S. Moore and Charles E. Flandrau, his attorneys, and says that in the record and proceedings in the above-entitled action and also in giving the judgment in said action there is manifest error in this, to wit:

1st. The evidence in the case and the admissions of the plaintiffs on the trial conclusively show that the various transactions between the plaintiffs and the defendant upon which this action is based were wagering and gambling contracts, and the court erred in not so holding and the jury erred in not so finding.

2nd. The court erred in admitting in evidence the rules of the board of trade of Chicago, which were excepted to by the defendant.

3d. The court erred in admitting in evidence the rules of the board of trade clearing-house of Chicago, which were excepted to by the defendant.

4th. The court erred in admitting the testimony of the witness James E. Boyd, one of the plaintiffs, in explanation of the manner in which the transactions in controversy were conducted and carried out under and in pursuance of the rules of the board of trade of Chicago, which were excepted to by the defendant.

5th. The court erred in admitting the testimony of the witness James E. Boyd, one of the plaintiffs, in explanation of the
49 manner and fact in which the payment of losses and profits accruing under the various transactions involved in this action were made to, received from, and adjusted by the Chicago board of trade clearing-house, which was excepted to by the defendant.

6th. The court erred in refusing to instruct the jury to return a verdict for the defendant, when so requested by the counsel for the defendant, at the close of the plaintiffs' testimony and case.

7th. The court erred in that part of its charge to the jury embraced in the following words:

"The time during which these transactions occurred commenced in August, 1888, and were concluded and the whole transaction finally closed up in June, 1889. The plaintiffs claim that the de-

fendant applied to the Minneapolis office to employ them to sell and purchase wheat for future delivery; that he inquired of the manager the commission to be charged, and was informed of the rate, and also told by the manager in charge that it was a good time to make some scalps, but what that term means has not been developed by the testimony;" which was duly excepted to.

8th. The court erred in that part of its charge to the jury embraced in the following words:

"It is claimed on the part of the plaintiffs that he was informed of the rate of commission for their services; that the contracts made for him would be subject to the rules, usages, and regulations of the chamber of commerce of the city of Chicago, and that in all cases actual wheat must be purchased and sold and the margins kept up to protect them against loss;" which was duly excepted to.

9th. The court erred in that part of its charge to the jury embraced in the following words:

"Now, if you find from the evidence that the plaintiffs, about April 29, 1889, informed the defendant by letter that the forty thousand bushels of May wheat in question could be at that
50 time changed to June wheat, and that the defendant made no answer thereto, and if you further believe from the evidence that said May wheat was changed over into June, for and on account of the defendant, and that the plaintiffs rendered an account, a report and statement, to defendant that said change had been made, and the defendant received such report and statement and retained it and made no objections to said change of said May wheat to June, then such facts amount to and were a ratification on the part of defendant of the acts of the plaintiffs in making such change;" which was duly excepted to.

10th. The court erred in that part of its charge to the jury embraced in the following words:

"The plaintiffs' theory is, and evidence has been introduced tending to sustain it, that they were employed by defendant, through the Minneapolis office, as brokers and commission merchants, to purchase or sell wheat, for future delivery, on his account, and that such sales and purchases were to be made on the Chicago board of trade with the members thereof; that such contracts were to be governed by the rules and usages of such chamber of commerce, and that in every instance actual delivery of wheat was intended by the parties to the contracts made for the defendant's account, and that these contracts were closed and settled up by the plaintiffs in accordance with these terms and at the defendant's request, and advances were made and their own money paid out for his benefit;" which was duly excepted to.

11th. The court erred in that part of its charge to the jury embraced in the following words:

"All optional contracts, however, are not illegal under the statute which was read to you. If the option is to sell or purchase at a future time, then it is illegal and a wager; but if the option con-

sists merely of a delivery within a specified time, the con-
51 tract is valid, and what was done by putting up margins amounts to nothing unless the contract itself is illegal. The validity of an option contract depends upon the mutual intention of the parties thereto, and if a sale or purchase of actual wheat for future delivery is intended, it is valid. If the contract is lawful the putting up of margins to cover losses which might accrue from fluctuations in prices in final settlement of the transactions, according to the rules and usages of the board of trade of the city of Chicago, is entirely proper and legitimate. These rules have been read to you by counsel for plaintiffs, and there is nothing in those rules on their face that indicates that they are in violation of the laws of Illinois or contrary to public policy;" which was duly excepted to.

12th. The court erred in that part of its charge to the jury embraced in the following words:

"Courts, however, must recognize from necessity the methods of carrying on business at the present day and apply well-settled principles of the common law to enfor-e contracts unless they are forbidden by statute or violate some rule of public policy. The daily mercantile business of the country, mercantile deals—and by that I mean the sale and purchase of personal property—could not be successfully carried on if merchants and dealers were unable to sell something which they did not have, but which they intended to get in the market and buy before the day of delivery. A trader has a right to sell, to deliver at some future time, that which he then has not, but which he expects to go into the market and buy; and the parties may agree mutually that there need not be a present delivery, but that such delivery mat take place at some other time. Such future-delivery contracts, however, must be in good faith; there must be an intention to make an actual sale and delivery of the article dealt in;" which was duly excepted to.

13th. The court erred in that part of its charge to the jury embraced in the following words:

52 "The theory of the plaintiffs is that they were brokers and agents appointed by the defendant to transact business in good faith for the purchase and sale of wheat for future delivery, and that they did so, and that all these little memoranda of the transactions at various times upon the chamber of commerce between these plaintiffs and other parties, members of that chamber, as evidenced by these papers offered in evidence, attached to the depositions, were contracts for the actual delivery of wheat, and they were sales and purchases of wheat for future delivery.

"If you believe that the plaintiffs were employed by the defendant as brokers to buy and sell wheat, and the contracts and memoranda which have been offered in evidence were upon their face contracts for the sale and purchase of wheat for future delivery, and the plaintiffs conducted this business for defendant's account, and at his request advanced money on said contracts, which is this indebtedness sued for, then the burden of proof is upon the defendant to

show, by a preponderance of evidence, to your satisfaction, that these contracts were wagers."

Also, "on the other hand, if you believe the evidence shows that the plaintiffs, acting as the defendant's brokers in the sale and purchase of wheat, entered into *bona fide* contracts for the actual sale and delivery of wheat with third parties, at his request, and subsequently settled losses and paid the amounts due under the contracts then they are entitled to a verdict and to recover the sums for this money paid out at his request.

"So, if you find from the evidence that the plaintiffs were brokers or commission merchants in the city of Chicago and members of the chamber of commerce of that city, and that at various times from August, 1888, up to June, 1889, they received orders from the defendant to buy or sell wheat; and, further, if you find from
53 the evidence that the plaintiffs, acting in good faith and in the belief that the defendant was sending said orders in good faith, made actual purchase and sales for said defendant, at his request, as ordered, and in such transactions laid out and expended money for the defendant for the purpose of such actual delivery, then the plaintiffs are entitled to recover the amounts thus paid, laid out, and expended for the defendant and their commission."

Also, "if you find that the plaintiffs were commission merchants of said city of Chicago and members of the board of trade in that city, and they acted as the brokers of the defendant, and at defendant's request, and from time to time during the period in evidence here, made in good faith the contracts read in evidence on the orders of the defendant, and that said contracts intended the actual delivery of wheat therein mentioned, and in settlement of the said contracts plaintiffs paid, laid out, and expended money for defendant, they can recover in this action; and if you believe from the evidence that these plaintiffs, acting as the agents of the defendant, entered into these contracts evidenced by these memoranda, and they were contracts for the purchase and sale of wheat, then such contracts cannot be rendered illegal by the mere intention of the defendant alone that he did not intend to deliver or receive the property. To make such contract read in evidence void as a wagering or gambling contract, each party to the contract must have designed and intended at the time the contract was entered into not to buy to receive the property, but to settle their mere differences between the contract price and the market price; and if you should find that the defendant intended to gamble in wheat and at no time to deliver or receive the property and pay for it, and if you also find that the plaintiffs were ignorant of such intention on the part of the defendant, and they received these orders of the de-
54 fendant to buy and sell in good faith, and in doing so incurred obligations for said defendant by said contracts, and the contracts intended the actual delivery of wheat, and plaintiffs paid money upon these contracts to adjust them for defendant, then they are entitled to recover a verdict in this action.

"On the other hand, I would say to you that these memoranda

which have been offered in evidence and the entries on the plaintiffs' books of these contracts are not conclusive evidence of their character. You are to determine what these contracts were; you are to determine them from the evidence in the case; you can look into the transactions themselves as disclosed by the evidence and determine from the facts and circumstances attending their making and the conduct of the parties thereto with reference to them whether they are illegal within the rule laid down or whether they are *bona fide* contracts for the purchase and sale of wheat to be delivered at a future time;" which was duly excepted to.

14th. The court erred in that part of its charge to the jury embraced in the following words:

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the board of trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is not evidence of their illegality. The mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take, and deliver the actual wheat at the time specified when the contracts were made;" which was duly excepted to.

15th. The court erred in that part of its charge to the jury embraced in the following words:

"The plaintiffs have introduced facts and circumstances
55 tending to show that that order was given, and in addition to that they have introduced the testimony of witnesses who testify as to an admission on the part of the defendant that the account was a correct account, and also that the account rendered was put in his hands in the neighborhood of the 29th of April, or thereabouts, and a letter was written, in which he was informed of the change; that no reply was made by him; that an account was rendered of the transaction; that he retained the account and had correspondence with the plaintiffs afterwards in regard to some other matters without mentioning or raising any objection to it, and that he gave no reply to the information contained in that letter. If you find from the evidence all these facts you are to say whether it did or did not amount to a ratification. If the facts are true, then there is a ratification;" which was duly excepted to.

And the said Theodore Hansen prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by reason of said judgment.

WM. S. MOORE,
CHAS. E. FLANDRAU,
Defendant's Attorneys.

(Endorsed:) Assignment of errors. Filed March 3rd, 1892. Oscar B. Hillis, clerk.

56 And on the same day the following bill of exceptions was filed of record in said cause, to wit:

57 United States Circuit Court, District of Minnesota.

JAMES E. BOYD *et al.*
vs.
THEODORE HANSEN.

Bill of Exceptions on the Part of the Defendant.

This action was tried at the December term of this court of 1889, on the 4th day of February, 1890, and the following days, before the Hon. R. R. Nelson and a jury.

The action was brought on two counts. On the first count or cause of action to recover the sum of seventeen thousand five hundred and ninety-eight and $\frac{36}{100}$ ($17,598.36) dollars alleged to have been paid, laid out, and expended by the plaintiffs, at the special instance and request of the defendant, on account of the purchase and sale of certain grain, made at the like special instance and request of the defendant, between the 24th day of August, 1888, and the 8th day of June, 1889, at the city of Chicago, in the State of Illinois; and on the second count or cause of action to recover the further sum of six hundred and fifty ($650.00) dollars for certain work and labor performed and care and diligence bestowed as factors or agents of said defendant, and at his special instance and request, in buying, selling, and disposing of and for the defendant certain grain at said city of Chicago during the time last above stated.

The defendant answers to said first count or cause of action that at various times from said 24th day of August, 1888, to the 8th day of June, 1889, this defendant contracted with and employed said plaintiffs to buy and sell for this defendant, at said city of Chicago,

58 not actual wheat but wheat options or futures, so called, for divers months during the time last aforesaid and extending to May, 1889, and said plaintiffs, so contracted with and employed, did buy and sell for this defendant, at said city of Chicago, for said divers months, said wheat options or futures; that in said buying and selling as aforesaid of said wheat options or futures it was understood and the agreement was by and between this defendant and the plaintiffs and those with whom the plaintiffs dealt on behalf of the defendant in said deals in wheat options and futures that there was to be no actual sales and delivery of actual wheat in any case, and the purchase or delivery of actual wheat was never intended nor contemplated by any of said parties, but it was understood and the agreement was by and between all of said parties—this defendant, the said plaintiffs, and all those with whom said plaintiffs dealt on behalf of this defendant in said wheat options and future deals—that the settlement was to be made between said parties, and all losses and gains adjusted between them by one party paying to the other the difference in values between the contract price, or price at which said wheat options or futures were bought,

and the market price of said wheat options or futures, according to the fluctuations in the market, and therefore the said contract and transactions were wagering contracts and wagering transactions and bets and wagers on the price of wheat, and were so understood and intended by all the parties thereto, and that said sum of seventeen thousand five hundred and ninety-eight and $\frac{36}{100}$ dollars ($17,598.36) alleged in said complaint to have been paid, laid out, and expended by the plaintiffs for the use of the defendant on account of the purchase and sale of certain grain, made at said city of Chicago by the plaintiffs for the defendant, was knowingly lent and advanced at the time and place of such gambling and betting by the plaintiffs to the defendant, at the city of Chicago, in the State of Illinois, in buying for this defendant said wheat options and futures, as hereinbefore stated, and carrying the same on his, this defendant's, account, and were at said time and times prohibited and declared illegal and void by the statutes of said State of Illinois, to wit, section one hundred — thirty (130) of chapter thirty-eight (38) of the Revised Statutes of 1881, and by sections 131 of the same chapter all promises, contracts, covenants, and agreements and other obligations for the payment of money where the whole or any part of the consideration shall be for money, property, or other valuable thing were by any gaming, betting, or wager on any lot, chance, casualty, or unknown or contingent event or other thing whatsoever prohibited in said section 130, or for the reimbursing or paying any money or property knowingly lent or advanced at the time of such play or bet to any person or persons so gaming or betting, or that shall be lent or advanced during such play or betting, shall be void and of no effect; and, except as hereinbefore stated, this defendant denies that said plaintiffs paid, laid out, or expended any money or other valuable thing whatsoever for the use of this defendant on account of the purchase and sale of certain grain or any grain whatsoever, at the city of Chicago or elsewhere, and alleges and charges the fact to be that the transactions, acts, and things in that behalf in said first pretended cause of action in said complaint alleged are the same transactions, acts, and things in this answer hereinbefore alleged and stated, to wit, the buying and selling options and futures in wheat on this defendant's account and carrying the same on this defendant's account, and lending and advancing money to this defendant for that purpose at the time and place and in the manner hereinbefore stated.

59

And for answer to the second count or cause of action in said complaint the defendant denies that said plaintiffs, at defendant's request or otherwise, performed certain or any of the work or bestowed any of the care or diligence as the factors or agents of this defendant or in any manner in or about the buying, selling, or disposing of divers or any goods, wares, or merchandise, or of any grain for or of said defendant, or in doing or transacting any other the business of said defendant other than and except in buying, selling, and dealing in said wheat options and futures, and applying this defendant's money and property to a large amount, to wit, the sum and amount of

60

about eleven thousand dollars, in paying losses suffered and paid by said defendant on said betting and gambling in said buying and selling of wheat options and futures by plaintiffs for this defendant, as hereinbefore in this answer to the first pretended cause of action in said complaint stated, all of which was at the time knowingly done by the plaintiffs and was prohibited by said laws of the State of Illinois hereinbefore in this answer cited.

And the defendant further answers, making a general denial of each and every allegation of the complaint not expressly admitted in said special pleas and answers to each of said causes of actions or counts.

The plaintiffs by their reply put the entire matter of the answer to each of said counts or causes of action in issue.

At the opening of the trial counsel for plaintiffs claimed on the pleadings that the burden of proof rested with the defendant.

The court held that plaintiffs must make out their case by proof; to which ruling the plaintiffs' counsel then excepted.

And upon the trial of said issues it was stipulated and agreed between the respective parties, plaintiffs and defendant, by their respective counsel, that the said statements of account produced in court and marked "Exhibit 1–1" to "Exhibit 1–20," inclusive, were to be used and offered in evidence in place of the books, and as evidence of the same facts that the books would show and with the same force and effect that the books themselves would have if produced in court and offered and received in evidence, and as evidence of all other facts shown by these statements of account; that recourse could be had to the books for matters not shown by these statements of account; that if there be additional evi-
61 dence required in this case statements of account may be used and offered by the plaintiffs and will be received in evidence in place of the books, and as evidence of the same facts that the books would show, and with the same force and effect that the books would have if produced in court and offered and received in evidence, and as evidence of all other facts shown by such statements of account.

The plaintiffs showed by evidence that they were partners in trade, under firm name and style of Boyd & Brother, and engaged in business in the city of Chicago, in the State of Illinois, from some time prior to the first day of August, 1888, to the first day of July, 1889, as brokers and commission merchants and members of the board of trade of said city of Chicago, and doing business on that board, and that during all that time they had a branch office for the same business at the city of Minneapolis, in the State of Minnesota, in charge of their agent, C. E. Handy, from some time prior to said first day of August down to about the first of February, 1889, who was succeeded in charge by their agent, L. E. Murphy, for a short time, when he was succeeded in charge of this Minneapolis office by their agent, G. M. Brush, who continued in charge, as agent of plaintiffs, until about the first of July, 1889; also that their business with the defendant Hansen was commenced and carried on at their Minneapolis office through their agents there in charge, and

that Hansen's orders to the plaintiffs were made by him to plaintiffs' agent at the Minneapolis office, and by that agent telegraphed to plaintiffs at Chicago. The plaintiffs also showed by evidence that the purchases and sales ordered by Hansen were executed by plaintiffs on the floor of the board of trade of Chicago, and that on each purchase and sale on Hansen's orders a "trading card" was made out by plaintiffs or their agents or employés, showing the date of the transaction, the person or party from whom or to whom the purchase or sale was made, the number of bushels and
62 price per bushel, and the month and year for which the purchase or sale was made. The plaintiffs also showed by evidence that these "trading cards" were transcribed into books kept by them and known as a "customer's book," and another known as the "option or brokers' book," and were the bases from which, with the addition of $\frac{1}{8}$ per cent. per bushel commission to plaintiffs for sales and purchases, said statements of account made by plaintiffs to the defendant and introduced in evidence, marked Defendant's Exhibits 1–1 to 1–20, and hereinafter stated and set out, were made.

That the defendant ordered all sales and purchases, on his account, by the plaintiffs, as claimed by them and as shown in said statements of account, "Exhibit 1–1" to "Exhibit 1–20," inclusive, except as hereinafter named; that the amount of grain purchased and sold by said plaintiffs, and the price at which said purchases and sales were made, and the amount of plaintiffs' commission thereon, and all other matters contained in said statements are true and correct, as in said statements set forth, except as hereinafter named; that the exceptions above referred to relate to the 40,000 bushels May wheat changed to the same number of bushels June wheat, April 29th, 1889, shown in said Ex. 1–17, and the 40,000 bushels June wheat sold on June 8th, 1889, shown in said Ex. 1–18 and 1–19, and that as to these items the exceptions, so called, arise not as to the correctness of these items as set forth in said statements, but only as to the authority and right of the plaintiffs to charge the defendant therefor, there being, it is claimed by the plaintiffs in the testimony of this case, a conflict of evidence concerning that authority and right, which is denied by the defendant.

CHARLES E. HANDY was sworn as a witness on the part of the plaintiffs on the trial of said action and testified:

63 Q. Do you know the firm of James E. Boyd & Brother?

A. Yes, sir. In the fall of 1888 I was manager for James E. Boyd & Co. in Minneapolis.

Q. In what business?

A. Grain and commission business.

Q. Did you meet Mr. Hansen, the defendant, in Minneapolis?

A. Yes, sir. Mr. Hansen came to me on 'change; we had had some little talk about business, and afterwards I met him in my office, room No. one, chamber of commerce, in Minneapolis, and after having some little business talk he asked me on what terms we did business, and I told him by the customer paying us $\frac{1}{8}$ of a cent com-

mission per bushel, and he would have to abide by the rules of the Chicago board of trade, and told him what the rules were as to the handling of grain on the board of trade, Chicago; also that he must keep his margins good at such times as the trades might be against him, so as to keep us secure, and that at any time he had a profit in any trade and closed it out he could have it immediately.

Q. Anything further?

A. I further went on and explained what the rules of the Chicago board of trade were, and that a delivery was contemplated in every trade, either by the buyer or seller, which was understood by him; that in case wheat was delivered he must take care of it and pay the purchase price and interest on the money, etc. That was in substance the conversation.

Q. How long did you continue in the employ of Boyd Brothers in Minneapolis?

A. Until the 1st of February, 1889.

Q. Will you examine the telegrams before you and see if there is any of these that pertain to orders that Mr. Hansen gave to you to be transmitted to Chicago?

A. —.

Q. Have you examined the telegrams?

A. Yes, sir; I only find three, or two, rather, relating to Mr. Hansen, of mine.

Q. Were the orders mentioned in those telegrams?

A. Yes, sir.

64 Q. State whether these orders were received by you from Mr. Hansen in pursuance of the conversation which you had with him about trading with Boyd Brothers.

A. Yes, sir.

Q. They were transmitted by you by telegraph?

A. Yes, sir.

Q. Have you examined the telegrams attached to the depositions?

A. Yes, sir; I have.

Q. From the examination you made of those telegrams attached to the depositions in this case that are signed by you, can you state whether or not they are the telegrams that were received at the other end of the line—the originals sent from here?

A. Yes, sir.

Q. Can you recognize them from your memory as the ones you sent?

A. Yes, sir; because I worded nearly all of my orders alike; I can tell from that.

Q. In regard to those orders contained in those telegrams, state whether or not the transactions mentioned in them—in those telegrams—were orders that were received from Hansen and transmitted to Boyd and Brother.

A. Yes, sir.

Q. In pursuance of that original conversation?

A. Yes, sir.

Objected to as leading.

Q. Have you had any conversation with Mr. Hansen, the defendant in this case, since this transaction occurred?

A. Yes, sir.

Q. When was it?

A. I think it was in August, 1889.

Q. What was said at that time by Mr. Hansen?

A. Well, I had been away. I was away perhaps three months. I returned in August and went down on 'change; Mr Hansen was there and he came up and spoke to me. I had just, two or three days previous, learned that this suit had been brought. I had some little conversation with Mr. Hansen in the hall, and on going he told me, I suppose you know that the suit has been brought. I told him I had just learned of it, and I had read his answer to the petition. I think I had a copy of it shown me by Mr. Brush. The conversation ran along on various topics until it finally drifted onto the subject of this suit again. The indebtedness was then admitted to me. He told me, further, if Mr. Boyd had not sued him he would have paid him. He asked me if I would not testify for him, and I told him I didn't think my testimony would be of much good to him. I should testify what the truth was.

Q. Was there anything said in that conversation of his with you in which he took the position that the transactions were fictitious transactions?

A. No, sir.

Objected to. Objection withdrawn.

Q. Where do you say this conversation was?

A. At the entrance of the chamber of commerce in Minneapolis.

Q. In August?

A. During the first days of August, 1889.

Q. 1889?

A. Yes; just subsequent to my return from the West.

Q. He admitted the indebtedness?

A. Yes, sir.

Q. And said he would have paid had he not been sued?

A. He said, I was hard up and I didn't have the ready money, and if they would let him alone he would pay it.

Q. Do you know anything about these receipts that Mr. Hansen gave?

A. Yes, sir; they were given to me.

Q. Will you state the circumstances connected with the giving of those receipts by Mr. Hansen?

A. Mr Hansen at that time had purchased various amounts of wheat through Messrs. Boyd Bros., in Chicago, on his orders given by Mr. Hansen to me. He became indebted to us in a certain amount. I was advised by telegram from Chicago to collect some money from Mr. Hansen. I notified Mr. Hansen to come down to Minneapolis. He said he was a little hard up for money at that time and the Chicago house was very solicitous about securing

the account in some way, and he suggested that he give
66 me those receipts, which were accepted. I think the last one was given to settle Mr. Hansen's account, as far as I remember; up to the closing of my relations with Messrs. Boyd Bros. The date of that was January 24th, 1889. The second receipt is dated January 14th, 1889, and the first one is dated January 4th, 1889. When these receipts were given it was stipulated at the time that should the market go beyond these the wheat was to be shipped into Minneapolis to be sold and the proceeds to be turned over to James E. Boyd & Brother. Part of it, I believe, was sold and the balance of it—I don't know what became of it; that was subsequent to my relations with them.

And on cross-examination this witness further testified:

Q. I understand you to say in your testimony that you were the resident agent of Boyd Bros. from August 25, 1888, down to February 1st, 1889?

A. Yes, sir.

Q. And personally conducted all these transactions which Mr. Hansen, the defendant, had?

A. Personally, by letter or by telegram.

Q. You were the person that conducted these transactions?

A. Yes, sir.

Q. In immediate contact with Hansen?

A. Yes, sir.

Q. And your house was connected with him only through you?

A. Yes, sir.

Q. How long had you been in Minneapolis prior to August, 1888?

A. Well, I have been there since about April 5th, 1884?

Q. Been residing there?

A. Yes, sir.

Q. And about what time did you commence this business for Boyd Brothers?

A. I think it was the first of Jan'y, '87.

Q. About that time?

A. Yes, sir.

Q. These transactions—all of them—during your residence there grew out of your meeting Mr. Hansen and becoming acquainted with him, and through that acquaintance and meeting him these deals were ordered through you?

A. Yes, sir.

67 Q. When you get the orders here do you remember the first purchase? I call your attention to this report, dated August 25, 1888. That report shows the purchase of 5,000 bushels May wheat on August 10th at 89⅛, I should think, and on August 14 of 5,000 bushels at 88⅝.

A. Yes, sir; that is right; he purchased August 10th and 14th 5,000 bushels.

Q. Amounting in the aggregate to?

A. 10,000 bushels bought.

Q. And the same report shows sold how many bushels?
A. 10,000 bushels August 24th at 95⅞.
Q. That closed that purchase and deal, didn't it?
A. Yes, sir; that closed that deal.
Q. You reported that to your house?
A. They reported it to me.
Q. They sent you up that report or a report containing the same matter—virtually the same matter?
A. Yes, sir.
Q. You carried that into a duplicate book in your office with that one in the main office?
A. Yes, sir.
Q. And from that you made this report?
A. Yes, sir.
Q. Which is really a copy?
A. Yes, sir.
Q. That August 25th report shows a purchase of 10,000 bushels, 5,000 bushels on the 10th and 5,000 bushels on the 14th, making 10,000 bushels in all, and on August 24th 10,000 bushels sold, which you say closed that deal?
A. Yes, sir.
Q. This is the purchase price, and this is the selling price?
A. Yes, sir.
Q. Showing a net gain?
A. Showing a net profit; yes, sir.
Q. That profit is made between the contract price and the market price, the difference between them at the time the deal was closed?
A. Yes, sir; less commission.
Q. Your commissions are charged into that account?
A. Yes, sir.
Q. Then you carried net gain $687.50, and then you entered further a credit to your account of $687.50?
A. Yes, sir.
Q. Now, when that report was made that stood to the credit of Hansen?
A. Yes, sir.
Q. A credit which your house owed him of that amount?
A. Yes, sir.
68 Q. That sum of $687.50 is included in this same account upon which this action is brought?
A. No, sir; that account was paid Mr. Hansen by myself.
Q. Are you sure about that?
A. Yes, sir; I think so. If I may explain that a little further it may make it more comprehensible. Mr. Hansen may not have needed this money at the time. Subsequently he had another trade, and that might have been estimated on the two trades. I couldn't say I settled for this trade individually with Mr. Hansen. I know at the time I severed my connection with Messrs. Boyd & Bro. Mr. Hansen's trades were settled for by giving these wheat receipts. On August 24th this was carried to his credit. August

30th he appears to have some loss on some grain, and September 1st we paid him $600 in cash.

Q. What I want to get at particularly is that this deal was closed August 24th and there was the sum of $687.50 carried to his credit?

A. Yes, sir.

Q. As the amount of money to which he was entitled on that transaction?

A. Yes, sir.

Q. And this is part of that general account?

A. Yes, sir.

Q. Did I understand you to say you made that $687.50 from the difference between the contract price and the market price at the time the deal was closed?

A. The difference between the prices there stated. The difference between 5,000 bushels of wheat at 89⅛ and 5,000 at 88⅜ and 10,000 bushels at 95⅞ will make that credit.

Q. In closing that deal it was supposed that that purchase of 10,000 bushels was covered by that sale of 10,000 bushels, and so you called that deal closed?

A. Yes, sir; I presume so; certainly.

Q. And this was all done under the orders of Mr. Hansen?

A. Yes, sir.

Q. And according to your agreement with him?

A. Yes.

69 Q. There is another account, August 30th, 1888, that shows that on August 30th he bought 10,000 bushels of December wheat at 92½, and on August 24th he sold 10,000 of December wheat at 91⅝?

A. Yes; that was a short sale. He sold that wheat to be delivered and afterwards bought it in, showing a net loss of $100. He sold the wheat on August 24th and bought it in on August 30th.

Q. Bought the wheat back again?

A. Yes, sir.

Q. Making a loss?

A. Making a loss of $100.

Q. There were just six days between these two transactions?

A. Yes, sir.

Q. Six days after the sale?

A. Yes, sir.

Q. That closed that deal?

A. Yes, sir; that closed these two deals.

Q. And you carried your commission into this?

A. Yes, sir.

Q. Then you carried out a net loss in the same way that you entered the gain on the other deal?

A. Yes, sir.

Q. The same as on the other transaction?

A. Yes, sir.

Q. This showed $100 net loss?

A. Yes, sir.

Q. Then you did debit you- account $100?
A. Yes, sir; charged it to him.
Q. It was his duty to have paid it?
A. Yes, sir.
Q. These deals are separate and independent transactions—that is, the deal of August 25th and August 30th?
A. Yes, sir.
Q. He had got an open account?
A. Yes, sir.
Q. He could stop anywhere and close his account?
A. Yes, sir.
Q. He could draw whatever was due him or pay whatever he was owing?
A. Yes, sir.
Q. So you call that deal closed?
A. Yes, sir; as far as that trade is concerned, it is closed.
Q. Then August 30th those purchases and sales were made according to Hansen's order, were they not?
A. Yes, sir.
Q. And carried out in connection with the board of trade rules?
A. Yes, sir.
70 Q. Now, here is a report of September 1st, 1888, which shows August 31st, bought 5,000 bushels of December wheat at 92, and on September 1st sold 5,000 bushels of December wheat at 93⅛, and what you have said of the others is true of this?
A. Yes, sir.
Q. You simply take the contract price and selling price, and the difference between the prices determines the amount?
A. Yes, sir.
Q. And you credit or charge this account with that amount?
A. Yes, sir.
Q. It was so entered here?
A. Yes, sir.
Q. There is a credit of $50?
A. Yes, sir.
Q. That was done on his orders?
A. Yes, sir.
Q. In all respects according to your agreement?
A. Yes, sir.
Q. On September 10th, 1888, there is another report: September 8th, bought 10,000 bushels December wheat at 93⅜; on September 1st, sold 5,000 bushels December wheat at 93¼, and September 3rd, sold 5,000 bushels December wheat at 94; commission, $12.50, and there was a net credit of $12.50. That closed that deal, didn't it?
A. Yes, sir.
Q. That was done, the purchases and sales were made on his order and in all respects according to your agreement, and there is commission $12.50 and $12.50 net gain.

Mr. KIRTON: We will admit that the witness will make the same statement as to each of the reports, and that as he has so defined one he will so define all.

Defendant's counsel now introduces the statements of account referred to, and the same are marked Defendant's Exhibits Nos. 1–1 to 1–20 and received in evidence without objection.

Account Purchase and Sale for Account and Risk of T. Hansen, Esq., by Boyd, Paxton & Boyd.

CHICAGO, *Aug.* 25, 1888.

	Aug. 10. Bo't 5,000 May wh't, 89⅛ ...	4,456 25	
71	" 14. " 5,000 " " 88⅜ ...	4,431 25	
	Aug. 24. Sold 10,000 " " 95⅞ ...	.....	9,587 50
	Com	12 50	
	Net gain	687 50	
		9,587 50	9,587 50
	Cr. your ac.....		687 50

Defendant's Exhibit 1–1.

Account Purchase and Sale for Account and Risk of T. Hansen by Boyd, Paxton & Boyd.

CHICAGO, *Aug.* 30, 1888.

Aug. 30. Bo't 10,000 Dec. wh't, 92½	9,250	
Aug. 24. Sold 10,000 " " 91⅝	.....	9,162 50
Com	12 50	
Net loss	.....	100
	9,262 50	9,262 50
Dr. ac.....	100 00	

Defendant's Exhibit 1–2.

Account Purchase and Sale for Account and Risk of T. Hansen by Boyd, Paxton & Boyd.

MINNEAPOLIS, *Sept.* 1, 1888.

Aug. 31. Bo't 5,000 Dec. wh't, 92	4,600	
Sept. 1. Sold 5,000 " " 93⅛	.....	4,656 25
Com	6 25	
Net gain	50 00	
	4,656 25	4,656 25
Cr. ac.....		50 00

Defendant's Exhibit 1–3.

72 *Account Purchase & Sale for Account and Risk of T. Hansen by Boyd, Paxton & Boyd.*

MINNEAPOLIS, *Sept.* 10, 1888.

Sept.	8.	Bo't	10,000 bu.	Dec. wh't,	93⅜.....	9,337 50	
"	1.	Sold	5,000 "	" "	93¼.....	.....	4,662 50
"	3.	"	5,000 "	" "	94.....	.....	4,700 00
			Com	.....		12 50	
			Net gain.....	.....		12 50	
						9,362 50	9,362 50
			Cr. ac.....				12 50

Defendant's Exhibit 1–4.

Account Purchase & Sale for Account and Risk of T. Hansen by Boyd, Paxton & Boyd.

CHICAGO, *Oct.* 6, 1888.

Sept.	11.	Bo't	5,000	Dec. wh't,	92⅜.....	4,618 75	
	"	"	5,000	" "	92½.....	4,625	
	"	"	5,000	" "	91¾.....	4,587 50	
	"	"	5,000	" "	91.....	4,550 00	
	19.	"	5,000	May "	95⅞.....	4,793 75	
	"	"	5,000	" "	96.....	4,800 00	
	26.	"	5,000	" "	100⅝.....	5,031 25	
	"	"	5,000	" "	100⅝.....	5,031 25	
Oct.	6.	Sold	20,000	Dec. wh't,	118¾.....	.....	23,750
	"	"	20,000	May "	120½.....	.....	24,100
			Com			50 00	
			Net gain			9,762 50	
						47,850	47,850
			Cr. ac.....				9,762 50

Defendant's Exhibit 1–5.

73 *Account Purchase & Sale for Account and Risk of T. Hansen by Boyd, Paxton & Boyd.*

MINNEAPOLIS, *Oct.* 13, 1888.

Oct.	8.	Bo't	25,000	Dec. wh't,	118.....	29,500	
	9.	"	10,000	" "	114⅞.....	11,487 50	
	10.	"	10,000	" "	111½.....	11,150	
Oct.	13.	Sold	10,000	" "	116⅜.....	.....	11,637 50
	13.	"	35,000	" "	116¼.....	.....	40,687 50
			Com			56 25	
			Net gain			131 25	
						52,325 00	52,325 00
			Cr. ac.....				131 25

Defendant's Exhibit 1–6.

Account Purchase & Sale for Account and Risk of T. Hansen, Esq., by Boyd, Paxton & Boyd.

MINNEAPOLIS, *Nov.* 3, 1888.

Nov. 3.	Bo't 30,000 Nov. wh't, 117.....	35,100	
Oct. 30.	Sold 30,000 " " 119.....	.....	35,700
	Com	37 50	
	Net gain	562 50	
		35,700	35,700
	Cr. ac.....		562 50

Defendant's Exhibit 1–7.

74 *Account Purchase & Sale for Account and Risk of T. Hansen by Boyd, Paxton & Boyd.*

MINNEAPOLIS, *Oct.* 30, 1888.

Oct. 11.	Bo't 20,000 May wh't, 114½	22,900	
30.	Sold 20,000 " " 119	.....	23,800
	Com.	25	
	Net gain	875	
		23,800	23,800
	Cr. ac....		875

Sold altogether 50,000 May wh't, 119.
Defendant's Exhibit 1–8.

Account Purchase & Sale 20,000 *Bu. Wheat for Account and Risk of The. Hansen by Boyd, Paxton & Boyd.*

MINNEAPOLIS, *Nov.* 15, 1888.

Nov. 14.	Bo't 10,000 bu. May wh't at 115...	11,500	
"	5,000 " " " 114½..	5,725	
	5,000 " " " 114⅝..	5,731 25	
Nov. 15.	Sold 20,000 " " " 115¾..	.....	23,150
	Com.	25	
	Net gain	168 75	
		23,150 00	23,150 00
	Cr. y'r ac.:.....		168 75

Defendant's Exhibit 1–9.

75 *Account Purchase & Sale 20,000 Bu. May Wheat for Account and Risk of Theo. Hansen by Boyd, Paxton & Boyd.*

MINNEAPOLIS, *Nov.* 28, 1888.

Nov. 14.	Bo't 20,000 May — at 115.....	23,000	
" 28.	Sold 20,000 " " 110¼.....	.....	22,050
	Com.	25 00	
	Net loss	.....	975
		23,025	23,025
	Dr. y'r ac.	975 00	

Defendant's Exhibit 1–10.

Account Purchase and Sale 50 M Bu. May Wh't for Account and Risk of Theo. Hansen by Jas. E. Boyd & Bro.

MINNEAPOLIS, 1, 31, 1889.

Jan. 31.	Bo't 50 M bu. May — at 97⅜.....	48,687 50	
24.	Sold 50 M " " 97.....	.....	48,500
	Com.....	62 50	
	Net loss	.....	250
		48,750 00	48,750 00
	To y'r dr.....		250

Defendant's Exhibit 1–11.

76 *Account Purchase and Sale 90 M Bu. May Wh't for Account and Risk of Theo. Hansen by Jas. E. Boyd & Bro.*

1888. MINNEAPOLIS, 2, 6, 1889.

Nov. 14.	Bo't 30 M bu. May wh't at 115....	34,500	
21.	" 5 M " " " 110½...	5,525	
	" 5 " " " " 110⅝...	5,531 25	
22.	" 10 " " " " 111¼...	11,125	
Dec. 14.	" 20 " " " " 111....	22,200	
1889.			
Jan. 13.	" 10 " " " " 104½...	10,450	
7.	" 10 " " " " 104 ...	10,400	
Feb. 6.	Sold 85 " " " " 100....	... ..	85,000
	" 5 " " " " 99¾...	.....	4,987 50
	Com.....	112 50	
	Net loss	.....	9,856 25
		99,843 75	99,843 75
	To y'r dr.....	9,856 25	

(Corrected statement.)
Defendant's Exhibit 1–12.

77 *Account Purchase and Sale* 90,000 *Bu. May Wh't for Account and Risk of Theo. Hansen, Esq., by Jas. E. Boyd & Bro.*

MINNEAPOLIS, 2, 6, 1889.

Nov.	14.	Bo't	30 M	bu.	May	wh't	at 115...	34,500	
	21.	"	5 "	"	"	"	110½..	5,525	
		"	5 "	"	"	"	110⅝..	5,531 25	
	22.	"	10 "	"	"	"	111¼..	11,125	
Dec.	14.	"	20 "	"	"	"	111...	22,100	
Jan.	10.	"	10 "	"	"	"	104½..	10,450	
	7.	"	10 "	"	"	"	104...	10,400	
Feb.	6.	Sold	85 "	"	"	"	100...	.....	85,000
		"	5 "	"	"	"	99¾...	.....	4,987 50
			Com					112 50	
			Net loss					.....	9,756 25
								99,743 75	99,743 75
			To y'r dr					9,756 25	

Duplicate of 1–12 correcting this.
Defendant's Exhibit 1–13.

78 *Account Purchase and Sale* 20 *M Bu. May Wh't for Account and Risk of Theo. Hansen by Jas. E. Boyd & Bro.*

T. H. MINNEAPOLIS, 2, 12, 1889.

Feb.	8.	Bo't	20 M	May	— at	104½	20,900	
	12.	Sold	" "	"		110	.....	22,000
			Com				25	
			Net gain				1,075	
							22,000	22,000
			To y'r cr				.....	1,075

Defendant's Exhibit 1–14.

Account Purchase and Sale 10 *M Bu. July Wh't for Account and Risk of Hansen by Jas. E. Boyd & Bro.*

MINNEAPOLIS, 2, 14, 1889.

Feb.	14.	Bo't	10 M	bu.	July	wh't	at 93....	9,300	
"	"	Sold	10 "	"	"	"	94¼...	.....	9,425
			Com					12 50	
			Net gain					163 50	
								9,425 00	9,425 00
			To y'r cr						112 50

Defendant's Exhibit 1–15.

79 *Account Purchase and Sale* 10 *M Bu. July Wh't for Account and Risk of Theo. Hansen by Jas. E. Boyd & Bro.*

MINNEAPOLIS, 2, 16, 1889.

Feb.	15.	Bo't 10 M bu. July wh't at $94\frac{1}{2}$	9,450		
	16.	Sold 10 " " " $95\frac{7}{8}$			9,587 50
		Com.		12 50	
		Net gain		125	
				9,587 50	9,587 50
		To y'r cr.			125 00

Defendant's Exhibit 1–16.

Account Purchase and Sale 40 *M Bu. May W. for Account and Risk of Theo. Hansen, Esq., by Jas. E. Boyd & Bro.*

MINNEAPOLIS, 4, 29, 1889.

Ap'l	16.	Bo't 10 M bu. May W. at $111\frac{1}{4}$	11,125		
		" 20 " " " " $109\frac{7}{8}$	21,975		
		" 10 " " " " $109\frac{1}{2}$	10,950		
Ap'l	29.	Sold 40 " " " " $81\frac{1}{2}$			32,600
		Com.		50	
		Net loss			11,500
				44,100	44,100
		To y'r dr.	11,500		

Defendant's Exhibit 1–17.

80 *Account Purchase and Sale* 65 *M Bu. No.* 2 *Wh't for Account and Risk of Theo. Hansen, Esq., by Jas. E. Boyd & Bro.*

MINNEAPOLIS, 6, 8, 1889.

Feb.	18.	Bo't 5 M bu. July W. at $94\frac{3}{4}$	4,737 50		
	19.	" 20 " " " " $94\frac{1}{2}$	18,900		
Ap'l	29.	" 40 " " June " $82\frac{1}{4}$	32,900		
June	8.	Sold 25 " " July " $77\frac{1}{4}$			19,312 50
		" 40 " " June " 79			31,600
		Com.		81 25	
		Net loss			5,706 25
				56,618 75	56,618 75
		To y'r dr.	5,706 25		

Defendant's Exhibit 1–18.

81 *Account — for Account and Risk of Theo. Hansen, Esq., by Jas. E. Boyd & Bro.*

1889.			MINNEAPOLIS, 6, 10, 1889.	
Jan. 31.	To grain		250	
Feb. 5.	" "		9,856 25	
Ap'l 29.	" "		11,500	
June 8.	" "		5,706 25	
Jan. 18.	By bal		.....	2,287 50
Feb. 12.	" grain		.....	1,075
	15. " "		.....	112 50
	16. " "		.....	125
M'ch 7.	" cash		.....	2,000
" "	" "		.....	1,000
June 5.	" "		.....	1,252 86
	5. " "		.....	310 84
	6. " "		.....	580 33
	7. " "		.....	320 11
	By bal		.....	18,241 36
			27,312 50	27,312 50
	To y'r dr		18,248 36	

Defendant's Exhibit 1–19.

82 *Account Purchase and Sale* 10,000 *Bus. Wheat for Account and Risk of Hansen, Minneapolis, by James E. Boyd & Bro.*

CHICAGO, *Jan'y* 7, 1889.

Nov. 10.	Bo't 10,000 bus. Jan'y W. at 112½	11,250	
Jan'y 7.	Sold 10,000 " " " 98⅞	.....	9,887 50
	Com	12 50	
	Net loss	.....	1,375
		11,262 50	11,262 50
	Dr. your ac	1,375	

Defendant's Exhibit 1–20.

83 It is admitted that the debtor and creditor amounts as shown in said statements are correct.

It is further admitted that the said reports or statements are the same reports referred to in the stipulation in this case, and that the said reports may be admitted and used in evidence in lieu of the books; and, further, that whatever may be found to be defective in the said reports may be supplied by the books.

Q. I show you another sheet, a balance-sheet; do you know anything about that? What does that purport to be?

A. That purports to be a statement of his account as to profits and losses and moneys received from him and moneys paid out to him.

Q. Up to what time or between what times?
A. Up to February 21st, 1889.

Mr. MOORE: I would say that these two accounts lap one another, but there is no difficulty in separating the same.

Q. These are accounts of the transactions that are shown by these reports?
A. Yes, sir.
Q. Who made that?
A. I think Mr. Murphy.

Mr. KIRTON: We will admit that that paper was a statement of account up to the time and at the time that Mr. Handy went out of the business, and that it was resumed by Mr. Brush, and that it relates to the same subject-matter contained in those reports, and that it was made up by Mr. L. E. Murphy; and, further, that the left-hand side of the page represents the debit side and the right-hand side of the page the credit side.

The same is offered and received in evidence without objection and marked Defendant's Exhibit No. 2 and read to the jury as follows:

84 DEFENDANT'S EXHIBIT No. 2.

T. Hansen in Account with James E. Boyd & Bro.

1888.							
Aug. 30.	To grain...		100	Aug. 24.	By grain...		687 50
Sept. 1.	" cash ...		600	Sept. 1.	" " ...		50 00
Oct. 6.	" draft...		9,762 50	10.	" " ...		12 50
"	" cash ...		150	Oct. 6.	" " ...		9,762 50
13.	" " ...		2,000	12.	" " ...		131 25
Nov. 1.	" " ...		675	9.	" cash ...		2,000
"	" " ...		450	30.	grain...		1,325
28.	" grain...		975	Nov. 3.	" " ...		1,231 25
1889.				Nov. 5.	" " ...		168 75
Jan. 3.	" " ...		1,375	Nov. 20.	cash ...		500 00
31.	" " ...		250	24.	" ...		1,000
Feb. 5.	" " ...		9,856 25	Dec. 3.	" ...		1,500
				Nov. 3.	error, 11, 3.....		6 25
				1889.			
				Feb. 18.	grain...		1,075
				15.	" ...		112 50
				16.	" ...		125
			26,193 75				26,193 75
Feb. 21.	To balance.		$6,506 25				

And this witness, CHAS. E. HANDY, further testifies on cross-examination:

Q. You can't recollect certainly nor remember distinctly where your first conversation with reference to his taking trades with you occurred?

A. My impression as to that is simply this: I had not talked business with him nor the way of doing business with Mr. Hansen until he came into my office and asked me what conditions we wanted, and I stipulated with him there as to the conditions under which I would take his trade, as I said before in my direct examination.

Q. Do you remember exactly that conversation?

85 A. I couldn't report it word for word. I could tell practically what it was. The question was asked me by Mr. Hansen, how we did our business. I said we would charge $\frac{1}{8}$ of a cent commission, and expect him to keep his margin good all the time; that the men I did business for were Boyd Brothers, of Chicago, and when there was wheat sold we were expected to deliver the wheat, and when it was bought we were expected to take it and pay for it, and in that case he must take it and protect us.

Q. You told him that?

A. Yes, sir.

Q. You swear to that?

A. Yes, sir.

Q. You went on and did business with him?

A. Yes, sir.

Q. No wheat was ever delivered to you, was it?

A. Yes, sir; wheat was delivered to me a good many times in Chicago.

Q. I mean in Hansen's case?

A. I don't know as to that.

Q. When you buy wheat in August for May delivery and then close it out in ten days, do you pretend to tell this court and jury that that wheat is delivered?

A. I don't know anything about that. I simply act as the agent in Minneapolis and transmit the orders from there; but I will further add that Messrs. James E. Boyd & Bro. time and time again have had wheat delivered to them in Chicago.

Q. Let me ask you whether or not, about the first of August, at the very first interview you had with Mr. Hansen, if the conversation was not in substance this: You met him and told him—assuming an acquaintance between you as subsisting as far as this case is concerned, you told him the price of wheat was somewhat favorable for making a few scalps, and you would like his trade—you would like to have him trade with you?

A. I don't remember; I might have said so.

Q. Didn't that occur just before Hansen came up to your office?

A. Possibly.

Q. At that time you said you thought the market was favorable

for making a few scalps, and you would like him to make his trades with you?

86 Objected to.

Q. You don't say positively you didn't say that, and possibly you did?

A. Yes, sir; it is possible.

Q. It is possible you did?

A. Yes, sir.

Q. Will you swear that at that conversation there was one single word said about the rules of the board of trade?

A. No, sir. I would not, because I don't know whether it was at that conversation or at another one, because I can't identify the exact date.

Q. Assuming that conversation to be true, and you say it was possibly true, you can't remember and you have no recollection of any such talk?

A. I don't assume that talk was had. I don't assume it is true; it was had, but I say I might have had it; that might have been the fact.

Q. You have no recollection of having that talk with Mr. Hansen, have you?

A. I don't recollect having that talk with Mr. Hansen, but I do recollect having a talk with him about the rules.

Q. About the rules?

A. Yes, sir.

Q. But you don't recollect about the scalping operation—about the market being favorable for making some scalps, making some trades?

A. I might have had such a conversation, but at what time I couldn't say.

Q. You have no recollection of that conversation at all?

A. I say I might have had it. I wouldn't swear to it.

Q. Are you or are you not willing to swear whether you remember it or not?

A. No, sir; I can't remember; it is fair to presume that I had such a talk with Mr. Hansen—some such a talk.

Q. If such a talk did occur, was there anything said, to the best of your recollection, about the board of trade or even about Boyd Bros.?

A. I think likely there must have been. I think it must have turned on that at the same time.

Q. Will you swear that there was any reference to them in that conversation, assuming that it did take place at all? Will

87 you swear that there was any reference to Boyd Brothers or to the board of trade?

A. No, sir; I cannot.

Q. Isn't it true that at the time Mr. Hansen came up to your office he simply told you he wanted to make a trade and nothing more?

A. No; my impression is that when Mr. Hansen came to my

office to transact business the conversation drifted onto the rules and the way we had of doing business, because we were then, at that time, practically a new house in Minneapolis. I was practically new to Mr. Hansen, outside of a mere speaking acquaintance. I had never had any business with him previous to that time.

Q. You think you gave him that discourse you got off here this morning on your direct examination?

A. I think I did.

Q. Will you swear you did?

A. I will swear that I was alive; I will swear I know that.

Q. To the best of your knowledge and belief?

A. To the best of my knowledge and belief, I told him what I testified to this morning.

Q. You have a decided recollection of telling that to him?

A. Yes, sir; I have, because I have a recollection of his asking me on what basis we did our business.

Q. The basis or per cent. of commission?

A. Yes, sir; and the general mode of transacting our business.

Q. You say you told him you did business under the rules of the board of trade?

A. Yes, sir.

Q. Did you have these rules (indicating book of rules)?

A. I didn't show them to him.

Q. You didn't show them to him?

A. No, sir.

Q. Did you tell him about the clearing-house?

A. No, sir.

Q. What did you tell him?

A. I told him that Boyd Bros. were in the commission business in Chicago and I was their Minneapolis representative.

Q. Commission business?

88 A. Grain and commission business, and I was their agent in Minneapolis, and, of course, we wanted to do business. He asked me how we did business, and I simply told him that we charged one-eight of a cent commission, and we expected to handle the grain, and expected our customers to take and pay for it if it was delivered to us in Chicago at any time.

Q. Did you tell him what the rules of the board of trade were with reference to any particular order?

A. No, sir.

Q. Wasn't it true you said that Boyd Brothers were doing a commission business on the board of trade of Chicago, and isn't that all that was said about the board of trade of Chicago?

A. I told him that they were in business in the board of trade building, in room No. 8.

Q. When you came to tell him about the board of trade of Chicago, are you sure you told him anything about the rules of the board of trade?

A. Yes, sir.

Q. What did you tell him?

A. I told him about the rules of the board, and that if he ex-

pected to do business with us he must comply with them as much as he would with any one else.

Q. Did you take pains to read him a lecture about the board of trade in the way you got it off this morning?

Objected to.

Q. You were in the commission business in Minneapolis?

A. Yes, sir.

Q. At the time these deals commenced?

A. I don't recollect. I only said I was the agent and representative of Boyd Brothers.

Q. Were you doing any commission business at all at that time?

A. Certainly I was doing commission business for Boyd Brothers as their agent.

Q. I want to make a distinction between handling grain and managing these deals. Had you any stuff whatever—any
89 produce or grain or anything of that kind, or cash wheat?

A. No, sir.

Q. You simply had an office there?

A. Yes, sir.

Q. As agent for Boyd Brothers?

A. Yes, sir.

Q. Then you were not what they call a commission merchant at all?

A. That is what we style it—grain and commission merchants. It was so printed on my windows and signs there, so that anybody could see it.

Q. At that time you had not handled any cash grain or produce, or anything of that kind?

A. No, sir; I was merely an agent; I was not handling cash grain. Mr. Boyd did that.

Q. In whose handwriting are these statements numbered 1–1 to 1–20 that were rendered from time to time?

A. Some of them are in mine and some are in the clerk's handwriting. I couldn't tell you exactly.

Q. When were these statements, in respect to their dates, delivered to Mr. Hansen?

A. According to these dates here.

Q. To the dates as they are stated there?

A. Yes, sir.

Q. They were ordinarily mailed to him?

A. Yes, sir; or if he was coming down the next day we would keep them and not send them to him.

Q. State whether or not they were always delivered on their dates or the next day afterwards.

A. Possibly the next day, at the farthest, unless we knew that Mr. Hanson would be in the office, and then we would keep it in the place of sending it by mail. He asked for them and he always accepted them.

90 FRANK W. TEAGARD was sworn as a witness on the part of the plaintiff- and testified that he resided in Chicago; that during the year 1888 and up to June, 1889, he was book-keeper and assistant book-keeper for Boyd & Brother, the plaintiff-, and further testified:

Q. State in what manner, if at all, you make out these accounts so based upon these trading cards.

A. These accounts are made up from the books, and the books are made up from the trading cards, and this is carried out. On this account there is the purchase price and the sale price.

Q. On the account?

A. Yes, sir; on the account when the trade is closed.

Q. Is a copy of these accounts kept?

A. Yes, sir.

Q. And another copy sent to the customer?

A. Yes, sir.

Q. Mr. Hansen, in this case?

A. Yes, sir.

Q. Have you examined these accounts which have been delivered to us by the defendant?

A. Yes, sir.

Q. With the impressions of the accounts as they were rendered to the defendant from time to time?

A. Yes, sir.

Q. Do you find all the accounts—I should say the copies of the transactions correspond with these accounts—or are there some omitted?

A. There are a few omitted, I believe.

Q. Have you examined the Minneapolis books?

A. Yes, sir.

Q. What accounts do you find in those books, or what impressions of accounts rendered do you find in those books that are not included in these accounts that have been delivered to us here?

A. I found one, I believe—in January, I think. I do not see any account for that here.

Q. Among these that have been delivered to us?

A. Yes, sir.

Q. Is there an impression of that on the impression book of the account rendered?

A. Yes, sir.

Q. Can you turn to that and find it?

A. Yes, sir; I can turn to that; it is in the Chicago book.

(Witness examines impression book.)

91 Q. Is that it?

A. Yes, sir.

Q. On page 32 of book entitled "Accounts, January 2 to March 19, 1889"?

A. Yes, sir.

Counsel reads same, which is as follows:

Account Purchase and Sale 10,000 *Bushels Wheat for Account and Risk of T. Hansen, Minneapolis, James E. Boyd & Bro.*

CHICAGO, *Jan'y* 7, 1889.

Nov. 10.	Bo't 10,000 bush. J'n'y W. at 112½	11,250 00	
Jan. 7.	Sold 10,000 bush. Jan'y W. at 98⅞	.....	9,887 50
	Com.	12 50	
	Net loss	.....	1,375 00
		11,262 50	11,262 50
	Dr. your ac.	$1,375 00	

Q. What, if any, other impressions did you discover in that book that you did not find among the accounts?

A. That is the only account of purchase and sale I couldn't find in that lot.

Q. Have you got a transcript of all the amounts that were bought and sold?

A. Yes, sir.

Q. With Boyd Bros., of Chicago?

A. Yes, sir.

Q. (Paper shown witness.) Is that it?

A. Yes, sir.

Q. Have you compared the amounts that you have discovered on this sheet from the books of Boyd Bros. with the accounts that have been furnished by the defendant here?

A. Yes.

Q. How do they correspond in amounts and prices?

A. They are all right, sir.

Q. Do you know and have you figured out the total amount of loss that there was in these transactions?

A. Yes, sir.

Q. What was it, over and above the moneys that were received by the Boyd Brothers?

A. Please state your question again.

Q. Can you state the aggregate loss or balance of loss, deducting the amount that was paid in?

A. $15,075.

92 Q. What was it finally?

A. $18,248.36.

Q. Has that amount been paid out?

A. Yes, sir.

Q. By Boyd Brothers on account of defendant?

Objected to as incompetent and leading, it not being shown that the witness knows anything about it.

Q. Do you, from the capacity in which you were employed as book-keeper, know what the amount of commission was on these transactions?

A. Yes, sir.

Q. How much?

A. ⅛ of a cent a bushel for buying and selling, inclusive.

Q. How much would that amount to on these transactions?

A. $631.25.

Q. Of what does this $18,000 and odd dollars consist—this amount that you have given us?

A. It consists of money paid out and commissions charged for services.

Q. The balance over the $631.25 was money paid out?

A. Yes, sir.

Q. Do you know how much money, during the course of these transactions, the defendant drew out?

A. (Witness produces a paper.) It was about—I have got a memorandum here somewhere—$13,637.50.

And on cross-examination this witness further testified:

Q. What did you make that account from? What is there in your original accounts from which you made that account afterwards?

A. This is entered; this is taken from the book and was stated in the book.

Q. And all the amounts carried out?

A. No, sir; simply the differences; that's all.

Q. Do I understand you that the aggregate cost price of that wheat is there on the book or not?

A. No, sir; it was not on the book.

Q. It is not entered there at all?

A. No, sir.

Q. What is there on any book? Point out to the jury what
93 there is on that statement that is on the book.

A. The date of purchase, the amount, the price, and the same way with that one.

Q. The amount was on the book?

A. That is stated on the book just as it is stated there.

Q. That figuring isn't on the book?

A. No, sir.

Q. And this figuring isn't on the book?

A. No, sir.

Q. I mean these over here—the cost price?

A. No, sir.

Q. Nor this selling price—I mean the aggregate?

A. No, sir.

Q. You never entered that amount of money on the book, and you never entered the aggregate cost of the wheat on the book nor the aggregate sale of the wheat on the books?

A. No, sir.

Q. That is not entered on your books at all?
A. No, sir; we never carried the prices on our books.

A JUROR:

Q. You mean the aggregate price?
A. We never carried the aggregate value; we did give the price always.
Q. The aggregate value you didn't give?
A. No, sir.
Q. Except the difference was charged up to loss and credited to profit?
A. Yes, sir.
Q. In the ledger?
A. Yes, sir.
Q. That is on the book?
A. Yes, sir.

By Mr. KIRTON:

Q. And that was arrived at from the price—the amounts according to the prices?
A. Yes, sir.
Q. Determined by the selling price?
A. Yes, sir.
Q. And the buying price?
A. Yes, sir.

The COURT:

Q. As I understand you, you put down the number of bushels and the price per bushel upon the purchase or sale, according as to whether it is a purchase or a sale, on your journal at the time, and at the time of closing the purchase or sale, then you take the aggregate amount of what the sale and purchase was and strike a
94 balance, and whatever the difference was went onto your books either as debtor or creditor?
A. Yes, sir.

The COURT:

Q. And these accounts that were rendered give the aggregate amount of each sale and purchase—that is, if you sold 10,000 bushels at 90 cents and purchased 10,000 at 80 cents, then you would carry out in the statement the various aggregate sums of the purchase and sale and strike a balance, and that difference went onto your books, but in the statements rendered the whole thing appeared as here?
A. Yes, sir.

Mr. MOORE (continuing):

Q. I see your commission is carried out on this statement of August 25th. Is that entered in your original entry or when is that entered?

A. It is entered on my journal from an impression of this account.

Q. At what time?

A. The same day that this account is rendered it is entered on the books.

Q. Is it entered on your books at any time up to the time this account is made out to be rendered?

A. That was entered there the same day as the account, the 25th of August. That would be entered on the book the same day as that on the journal and posted from that into the ledger.

Q. This would enter on your books: August 10, bought 5,000 bushels May wheat, 89⅛?

A. Yes, sir.

Q. And stop there?

A. Yes, sir; that is, on the customer's book.

Q. What do you mean by the customer's books; what books do you keep?

A. We keep a customer's book showing all the transactions that customers make, and then when an account of sale and purchase is made it is rendered from the customer's book. This account is copied in the impression book and put into the journal, and from the journal it is posted into the ledger, and carried to credit or debit.

Q. Now, it says here: August 10, bought 5,000; 5,000 what?

A. 5,000 bushels.

Q. May wheat, 89⅛; would that go on the customer's book?

A. Yes, sir.

95 Q. August 14, bought 5,000 at 88⅜?

A. Yes, sir.

Q. You would enter that on the customer's book?

A. Yes, sir.

Q. And you would stop there?

A. Yes, sir.

Q. August 24, sold 10,000 bushels at 95⅛. You would put that on the books on the side of sales?

A. Yes, sir; on the sales side.

Q. At that time there had *got* been no entries made except in the customer's book?

A. No, sir.

Q. When that transaction was closed on August 24th what would you do?

A. I would render an account on the 24th of this account of purchase and sale, and when made out send it to the Minneapolis office.

Q. What was sent to the Minneapolis office?

A. The same as this; a copy of that.

Q. Up to August 24th you have three entries on the customer's books?

A. Yes, sir.

Q. When was that amount carried out; in what book first—that is, the aggregate cost of the wheat?

A. There was nothing carried out in the customer's book. This account is made out.

Q. Was it ever carried out in any book?

A. No, sir.

Q. Then, the aggregate value of the wheat was never carried out on any book?

A. No, sir.

Q. Then, when you have closed the deal you take the customer's book and do what?

A. Take the customer's book and make out this account.

Q. This account?

A. Yes, sir.

Q. Where do you get your commission from?

A. Commission, an eight- of a cent a bushel; 10,000 bushels would be 12.50.

Q. You make that out of the customer's book?

A. Yes, sir.

Q. Net gain, how do you make that out?

A. 687.50.

Q. Don't you carry out the aggregate costs of the selling price, what the wheat sold at and the cost of the purchase, in order to get the difference?

A. Yes, sir.

Q. And these two amounts are of no account except for
96 the purpose of figuring the fluctuations between these two prices?

A. They are put there to see the difference—whether he has made or lost, and what he has made or lost.

Q. That is all they are used for?

A. Yes, sir.

Q. You used them for that purpose; pou used them in this instance and in all these accounts for that very purpose?

A. Yes, sir.

Q. Then this account is made out on the difference between the cost price and the selling price, according to those fluctuations in the market?

A. On the fluctuations in the market.

Q. Or the changes in the market, whichever way it goes?

A. I don't understand that question.

Q. You paid so much for the wheat?

A. Yes, sir.

Q. And you carried that out?

A. Yes, sir.

Q. And you sold the wheat at so much?

A. Yes, sir.

Q. And you carried that out?

A. Yes, sir.

Q. Deducting one from the other when there is a fluctuation in the market?

A. Yes, sir.

Q. The difference in the market price?
A. Yes, sir.
Q. That is the way you make out the accounts?
A. Yes, sir.
Q. And the object of carrying out the cost price of the wheat and the selling price of the wheat would be simply to find out the difference between the cost and the selling price of the wheat?
A. Yes, sir.
Q. If it was a net gain it would appear by subtracting one amount from the other?
A. Yes, sir.
Q. That net gain was set down on the change in the market price?
A. Yes, sir.
Q. That is all there is to it?
A. Yes, sir.
Q. And that account was made in that very way?
A. In what way do you mean?
Q. The one I spoke to you about, by deducting the selling price from the purchase price.
A. Yes, sir.
97 Q. And ascertaining the difference between them?
A. It was made out of the difference between the purchase price and the sale price, and the difference was $687.50.
Q. By taking one sum from the other?
A. Yes, sir.
Q. And he was credited with that?
A. Yes, sir.
Q. You credited him with that $687.50?
A. Yes, sir.
Q. You put it in his account?
A. Yes, sir.
Q. And then sent it to Minneapolis?
A. Yes, sir.
Q. And they sent him that account?
A. No, sir; I don't know what they did about it.
Q. They made out a similar account?
A. Yes, sir.
Q. And you expected them to settle with him on that basis?
A. Yes, sir.

Objected to as not cross-examination.

Q. Now, then, in the customer's book, at the time you made the account, you carried that out, and you carried the net gain or the net loss in?
A. In the customer's book?
Q. Yes.
Q. And you carried that commission in and you carried the net gain or loss in?
A. No, sir.

Q. At the time you made up the accounts all this appeared on the customer's book?

A. No, sir; nothing appeared on the customer's book about commission.

Q. Nothing about commission?

A. No, sir.

Q. Nor about gain or loss?

A. Yes, sir.

Q. You make out the customer's book by the buying price and the sale price?

A. Yes, sir.

Q. And you make your commission on the amount sold and purchased?

A. Yes, sir.

Q. Then you make the balance of the account by ascertaining the difference between the price at which you bought and the price at which you sold?

A. Yes, sir; and the commission is charged to the debit side.

98 Q. That is the way it is done?

A. Yes, sir.

Q. The other book that was made from that account, that book would correspond with that account if that account is made from the customer's book?

A. Yes, sir; it should.

Q. The books should correspond?

A. Yes, sir.

Q. The account is made from the customer's book, and the journal entries are made and posted then in the ledger?

A. Yes, sir; grain would be debited $687.50, and credit commission $12.50, and that would be all posted on the ledger.

Q. Grain would be debited how much?

A. $687.50.

Q. And commission what?

A. Credit commission $12.50.

Q. And credit Hansen?

A. $687.50.

Q. Grain account is debited the full amount that Hansen is credited?

A. Yes, sir; Hansen's account and commission is credited.

Q. You put that on the journal?

A. Yes, sir.

Q. So that instead of making the account from the books you make the books from the account?

A. Yes, sir; I post this book from the impression book that I have in the office. It is the same as that.

Q. The first thing in order is the customer's book?

A. Yes, sir.

Q. The first thing to do is to make out this account in the manner and form that you have stated?

A. Yes, sir.

Q. The next book is what?
A. The journal.
Q. You copy that into the journal?
A. Yes, sir.
Q. What is your impression book?
A. An impression is taken of that account and then the account is posted in the journal. These entries are made in my journal from the impression book.
Q. The original account is made from the customer's book?
A. Yes.
Q. Then you make an impression of that?
A. Yes, sir.
Q. You copy that?
A. Yes, sir.
Q. And from that copy the entry is made in the journal?
A. Yes, sir.
99 Q. That is the way you do it?
A. Yes, sir.
Q. So that instead of making this account from your journal you make the impression in the book and the entry in the journal from the account?
A. Yes, sir.
Q. To get it in a word, you make it from your customer's book?
A. Yes, sir.
Q. Is that true as to all these accounts which I hold in my hand? Here is one of August 30.
A. They are the Minneapolis accounts.
Q. Did you yourself attend to all of this?
A. Yes, sir.
Q. I understand you are a mere book-keeper?
A. Yes, sir.
Q. In keeping those books you have testified as to the manner in which you kept them. In fixing the commissions, do you fix your commissions always the same way?
A. Yes, sir.
Q. With the plaintiffs?
A. Yes, sir.
Q. In this whole transaction?
A. Yes, sir.
Q. From the beginning to the end?
A. Yes, sir.
Q. You simply carried out the gross cost of the wheat?
A. Yes, sir.
Q. And the gross selling price of the wheat?
A. Yes, sir.
Q. You deducted the one from the other to get the loss or gain?
A. Yes, sir.
Q. You charged the loss or credited the gain to him according to whether he made a loss or a gain?
A. Yes, sir.

Q. You either credited him on your books with a gain or charged him with a loss on your books, as he made a gain or loss?

A. Yes, sir.

Q. And that is the account?

A. Yes, sir.

Q. And the commissions were entered to your account and eighth of a cent a bushel commission on the gross amount bought and sold?

—. —.

Q. The deal includes first the buying of the grain?

A. Yes, sir.

100 Q. Then you don't close out that deal until the same amount of grain is sold?

A. No, sir.

Q. Then you carry on your customer's book the fact of the sale?

A. Yes, sir.

Q. The amount of the sale and the price?

A. Yes, sir.

Q. The amount of the sale is the same as the amount of wheat bought?

A. Yes, sir.

Q. But the price is generally different?

A. Yes, sir.

Q. Then you carry out the aggregate price?

A. Yes, sir.

Q. Then you carry out your commission to the extent of an eighth of a cent and figure out the net gain or loss and make it in every instance as you have stated?

A. Yes, sir.

This witness, continuing, further testifies as to the payments by plaintiffs at the clearing-house and the manner and time of these payments as follows:

A. I was assistant book-keeper from about August, 1888, until the first of February, and after that head book-keeper until the time of the closing of the firm.

Q. Do you know of your own knowledge that one dollar was ever paid out?

A. Yes, sir.

Q. How?

A. The trades were entered on the book and we paid money on these transactions.

Q. How did you pay money on those transactions?

A. On the settlements that were made to the clearing-house.

Q. Then the only knowledge that you have of what Mr. Hansen owes your house or what your house has paid out for him is gained from these books, is it not?

A. Yes, sir.

Q. In other words, you conclude that Mr. Hansen owes your house

this aggregate of some 18,000 odd dollars because the debits on these trades exceed the credits on these trades by that amount?

A. Yes, sir.

Q. Exclusive of commission, how much is that?

A. The $18,248.36 includes the commissions.

Q. You arrive at that conclusion from the books, and it is
101 the difference between the amounts that Hansen is credited with and what he is debited with, isn't it?

A. Yes, sir.

Q. He is debited with commissions and he is debited with the loss on the deals, on the options, and he is credited with the gains?

A. Yes, sir.

Q. The net gains?

A. Yes, sir.

Q. All you know about it is simply that it so appears from your customer's book and from your trade cards and from your option book?

A. Yes, sir.

Q. And so now you testify to this jury that Boyd Brothers have paid out this amount, $18,000 odd, on account of Hansen; do you testify to that of your own knowledge?

A. I mean according to the books.

Q. Except as appears on these books, you don't know that they have paid out a dollar, do you?

A. No, sir; except by the books.

Q. Did you make it from the books or from the accounts that are rendered here?

A. Did I make what?

Q. The amount that Hansen owes your house?

A. I made it by the books and accounts, sir.

Q. How do you know how much he drew out?

A. By the books.

Q. Have you any other knowledge of it?

A. No, sir.

Q. Where does the book show what he drew out?

A. The entry is made on that.

Q. Whereabouts was that? You have your trading cards and your option book and your customer's book; is that all there is of this apparatus?

A. We keep a cash book and a ledger.

Q. You keep a ledger and a cash book, do you?

A. Yes, sir.

Q. That cash book is in addition to what you have already testified to?

A. Yes, sir; I told you we kept a ledger.

Q. What is in the ledger?

A. Individual accounts.

Q. What do you keep in your ledger?

Objected to as not cross-examination.

A. Accounts.

102 The COURT: I supposed you admitted the accounts as they appeared in the books. It cannot be necessary to go back and examine the books. The question is whether these men settled the amount between the purchase and selling price of the wheat according to the rules, usages, and regulations of the board of trade and paid out any money for this defendant under the contract, if any existed; and, further, whether there was an intention at the time to make a *bona fide* sale and delivery according to the contract, as set up in the complaint.

Q. That is all the basis you have for your statement that the plaintiffs, the Boyd Brothers, have paid out this $18,000 odd?

A. No, sir; we have a clearing-house system. I can't tell whom it was paid to.

Q. Have you, in addition to this, a clearing-house system?

A. Yes, sir; the same as a bank clearing-house.

Q. On what did you make the statement that the plaintiffs had paid out $18,000 and over?

A. By my books.

Counsel for defendant moves to strike out the testimony of the witness, as it appears he is testifying from nothing but the books.

The COURT: No; he can testify to that from his knowledge that he gets from his books.

Q. With regard to the money that appears on that statement, there appears to have been debited Mr. Hansen's account as losses. Do you know and what knowledge have you, as the keeper of these books, how that money was paid out by Boyd Bros. for it?

A. Yes, sir.

Q. How?

A. It was paid out to the clearing-house.

A. To the clearing-house?

A. Yes, sir; the differences between the prices on settlement.

Q. It was paid out to the clearing-house on the indebtedness that you would owe the clearing-house?

A. Yes, sir.

Q. State what these amounts, the aggregate amounts that were paid to the clearing-house, were; of what did they consist, as

103 with respect to one or more customers?

A. I don't quite understand your question.

Q. Supposing that there are 50 customers that they have and there is an aggregate amount to be paid over to the clearing-house, do they aggregate all these customers' accounts and pay in the losses and receive the profits from the clearing-house?

A. We might collect $10,000 from the clearing-house and on Mr. Hansen's wheat we might have paid $5,000. The other customers' deals would be mixed in with this transaction and with ours in the clearing-house.

Q. That is, one of the customers might make a profit and another might sustain a loss, and if the total amount of the losses

exceeded the total amount of profits you would have to pay the difference to the clearing-house?

A. Yes, sir.

Q. And the converse of that is true—if the total amount of profits exceed the total amount of losses, then you receive the difference from the clearing-house?

A. Yes, sir.

Q. Did you keep a clearing-house account?

A. No, sir.

Q. In what way are your accounts paid at the clearing-house?

A. If we pay the clearing-house we charge grain account; if we receive from the clearing-house we credit grain account.

Q. That would go on what they call a clearing-house sheet?

A. No, sir.

Q. State how you arrive at the amount.

A. We take the difference—we collect from the different brokers and add them up, and then take the amount we pay the different brokers and add them up, and if there is a balance against us that is debited to clearing-house, and if you have to receive anything that is credited to clearing-house, and we give our check to the clearing-house or get a check from the clearing-house, as the case may be.

Q. In the event of Boyd Brothers not having paid this amount of loss that is charged to Mr. Hansen's account, what would have been the result as to their continuing to do business on the
104 board?

Objected to as not the best evidence and as not proper testimony.

The COURT: I think that is proper if you have rules of the clearing-house to that effect.

Q. Do you know as a matter of knowledge, derived from your keeping the books of account, that all the balances due the clearing-house, including the amount that arises out of the losses sustained by Mr. Hansen, were paid by Boyd Brothers?

A. Yes, sir.

Objected to.

The COURT: If he knows and can explain how it is done, I think it is proper testimony.

Q. Do you know, from your knowledge of the system of keeping the books, that balances that would be due the clearing-house account, losses that were sustained, including Hansen's loss, were paid to the clearing-house?

A. I know they were paid to the clearing-house by my balances, or my grain would not balance when we closed up the business.

Mr. MOORE: Do you limit your question to the books?

Mr. KIRTON: Certainly. I think it is the best evidence a man can be possessed of.

The COURT: As I understand it, this clearing-house is one great bank, in which all these brokers, including the plaintiffs, settled their accounts and differences, and if they owe anything upon any

contracts or if their customers owe anything on any contracts it is paid into the clearing-house, and if anything is due them that is paid by the clearing-house.

WITNESS: Yes, sir; they clear all the transactions.

Q. That is the system there?

A. Yes, sir.

Q. You have a general knowledge that these trades went before the clearing-house?

A. It was entered in our books, and therefore it must have gone through the clearing-house.

105 Q. All you know about its going through the clearing-house is you found it entered on your books?

A. Yes, sir.

Q. Is that true of all these others?

A. Yes, sir.

Q. What is the settlement book?

A. Settlements that have been transacted between the brokers.

Q. Supposing there had been no other unsettled account but what appears on that transaction (witness shown a statement of account), how would you get out that 640-odd dollars which is profit; how would you get at it?

A. There had been a settlement made between the brokers and they would have paid me that amount of money.

The COURT: How would they know there was that amount to your credit?

A. They make it when they call the settlements. For instance, if I have 5,000 wheat sold to you and make a contract to sell you 5,000 wheat for future delivery, and you sell it to him, and he sells it to me, that is what I call making a settlement. I sold it at 90 and you sold it at 91 and he sold it to me at 92, that would make a settlement at 92. You would want $50, he would want $50, and I would owe the money. They would settle by my paying $100, and he would collect $50 and you would collect $50.

The COURT: Then every broker must go there to the board of trade?

A. They are supposed to go there every day, or at least whenever the laws may require them to go there.

Q. Every broker that does business is a member of the clearing-house and is compelled to go there to make his settlements in accordance with the rules governing that body?

A. Yes, sir.

The COURT: The question is whether the original contract was lawful or not, and all this mode of settlement and everything of that sort and the rules governing this board do not necessarily make the original contract unlawful. It is only evidence to show how this was done and how this indebtedness accrued.

106 Redirect examination by Mr. KIRTON:

Q. When you speak of settlements that are made by other boys they are settlement boys connected with the office?

A. Yes, sir.

Q. They simply adjust one of those trades where you have bought and sold?

A. Yes, sir.

Q. But as to the balance, that is attended to by you in the usual course, in the office?

A. Yes, sir.

By Mr. MOORE:

Q. How do you know it is?

A. I made out the checks and deposited them, and the differences I received and paid to the clearing-house were made out by me. I collected the amounts received and deposited them in the bank. I was cashier as well as book-keeper.

Q. Can you state you made out the checks for the amounts on these bills?

A. No, sir.

By Mr. KIRTON:

Q. Did you pay that money out (referring to statement of account) in substance?

A. Yes, sir; but I mean I did not pay out that particular amount.

Q. But you paid out that amount in substance?

A. Yes, sir.

By Mr. MOORE:

Q. Can you testify you paid that out with other money right along to the clearing-house, this $687.50 that is there on that account?

A. Yes, sir.

Q. August 25th?

A. Yes, sir.

Q. How do you know?

The COURT: Do you know from the books?

A. I can tell by my books being in balance. If I did not pay that money out or, rather, if I did not collect that amount of money, my books would be out of balance and would not balance.

Q. That is the only way you know about it?

A. Yes, sir.

Q. You have no distinct recollection of paying that money or receiving that money from the clearing-house alone or with other moneys?

A. I must have received it or my books would not balance.

Q. And your books did balance?

A. Yes, sir. *A.* The gentleman that kept the books before me left his books balanced, and when I left they balanced, and they must have been correct.

107 JAMES E. BOYD, sworn on his own behalf as one of the plaintiffs, testified as follows:

Examination-in-chief by Mr. KIRTON:

Q. You are one of the plaintiffs in this suit?
A. Yes, sir.
Q. Do you know the defendant?
A. I never saw him until today; never spoke to him in my life.
Q. What was your business during the years 1888 and 1889?
A. Commission.
Q. Where?
A. Grain and provisions, in the city of Chicago.
Q. Whereabouts in the city of Chicago?
A. Board of trade, No. 8 and No. 63.
Q. Were you and your brother, composing the firm of Boyd Bros., members of the board of trade?
A. Yes, sir.
Q. As commission merchants doing business on the board of trade, what does your business involve and what did it during that time?
A. The purchase and sale of grain and provisions and the receiving and delivering of the same.
Q. Have you a copy of the rules of the board of trade?
A. Yes, sir.
Q. Have you them here?
A. I have them in my hand.

Plaintiffs' counsel proposes to offer the same in evidence.

Objected to as immaterial and incompetent.

Plaintiffs' counsel proposes to show by another witness that at the inception of these transactions in question the defendant was told that all these transactions would be done on the board of trade of Chicago and in conformity with their rules, and explanations were made to him how it was to be done.

Mr. MOORE: After you have shown that it will be all right.

The COURT: If they propose to show that it may go in evidence.

Said rules, being in the form of a book, are offered in evidence by plaintiffs' counsel and marked "Plaintiffs' Exhibit A."

108 Defendant's counsel objects to the same as not being authenticated and not part of the *res gestæ*, and that in any event only certain of the rules are material to this issue, and the same should be specified and only those ones offered in evidence.

The COURT: I think you had better point out the rules.

Q. Then as I understand it, in the commission business as you were conducting it on the board of trade, that business was conducted in pursuance of these rules and regulations of the board of trade?

Objected to.

Q. In what manner was the business conducted with respect to these rules?

A. What business are you talking about?

Q. The commission business.

Objected to as immaterial and incompetent.

The COURT: They must call his attention to specific rules.

A. All the business that James E. Boyd & Brother ever did on the board was conducted in accordance with the rules of the board of trade.

Q. Did you have any outside agencies established?

A. Yes, sir.

Q. In Minneapolis?

A. One at Minneapolis, one in New York, and one in St. Louis.

Q. Who was in charge of your agency at Minneapolis when you began business there?

A. Charles E. Handy.

Q. And who after him?

A. Mr. L. E. Murphy part of the time and George M. Brush part of the time.

Q. Will you describe the system under which money was paid out on the part of customers or paid in?

Objected to unless it relates to the rules.

Q. The rules do prescribe that?

A. Yes, sir.

Q. In this book?

A. Yes, sir; there are rules there called the clearing-house rules. There is a section that explains how business should be done through the clearing-house.

Q. Will you state with reference to this whether or not
109 the amount that was charged up to Mr. Hansen in this suit was actually and in fact, less $631.25 commissions, paid out by your firm?

A. I will state that according to the reports of my book-keeper that money was paid out of the firm.

Objected to as hearsay, and defendant's counsel moves to strike out the same.

Q. I will ask you to state whether or not you have paid and settled all obligations that were incurred during the time you were in business on the board of trade?

A. Yes, sir.

Objected to as immaterial and incompetent.

The COURT: I think it is proper.

WITNESS: We have paid everything.

Objected to.

The COURT: I think it is proper if they can bring this transaction within that settlement.

Q. Have you paid everything connected with your entire business?

A. Yes, sir; we have settled up the business and paid all of the indebtedness, or I have myself, to the amount of $300,000 or over.

And on cross-examination this witness further testified:

Q. Did you personally transact any of this business with defendant Hansen?

A. At the latter part; yes, sir.

Q. At what time?

A. Closed up his last trade or ordered it done.

Q. Do you know of your own personal knowledge what you did when you did that?

A. Yes, sir; I do.

Q. What was it?

A. I telegraphed Mr. Hansen and told him that his account was behind and that I desired him to put up some more money or give me some security for his trades. Mr. Hansen's telegram is there. I don't know the exact wording of that; I made a copy of my dispatch, and we have it here in the books also; that is the sum and substance of it.

Q. In this matter in controversy here what personal con-
110 tact with the defendant did you have or what personal knowledge of it have you got over and above the fact that you ordered the last trades to be closed?

A. No personal knowledge, only what I saw on the books myself. I saw he had so much wheat bought there at a certain price.

Q. Your knowledge is from the books?

A. Yes, sir; from the books and from the accounts. I took my book-keeper's word for it.

Q. As to the deals made here in Minneapolis, of course you don't know anything about them except as they appear on the books in Chicago?

A. Only what the books and dispatches and letters show.

Q. When was this last transaction, do you remember?

A. There is the report of it there. The transaction will show I ordered it closed out.

Q. The accounts rendered him show how it was closed out?

A. Yes, sir; they do.

Q. That is all you really know about it?

A. I know more than that about it; I know I paid this money or it was paid out by me for Mr. Hansen.

Q. How do you know that?

A. By the books and by furnishing the money.

Q. What money do you refer to?

A. All that was paid out for Mr. Hansen—all of it.

Q. Then, was it a fact that these accounts of Mr. Hansen's were paid to the clearing-house?

A. Yes, sir.

Q. How do you know that?

A. I know if I hadn't paid my indebtedness I couldn't have remained on the board of trade.

Q. What do you refer to when you say you furnished the money to pay Mr. Hansen's indebtedness or account in June?

A. I know that the firm of James E. Boyd and Brother lost so much money during the time we were in business, and I furnished the money to pay the indebtedness. We lost it by various failures and by other means.

Q. That is all you know about Hansen's account, that
111 there was an aggregate indebtedness of a very large amount made in failures and in losses and unfortunate trades under the rules of the board of trade, and that it cost you a large amount of money to settle it?

A. I know about Hansen's account from the books, because I examined the books personally. I know that Mr. Hansen had had large amounts of money.

Q. According to the books?

A. According to the books. I know from the books that Mr. Hansen had received a large amount of money from our house—more than he had paid in. I know the books show the purchase of so much wheat and a sale of so much wheat, and he had losses and gains upon that wheat, and I know those losses and gains were paid or received daily through the clearing-house.

Q. How do you know that?

A. Because I know that the book-keeper made out the accounts with the clearing-house every day, and a balance was called either for or against us, and we either received from or paid to the clearing-house every day, and I know if we didn't do that we couldn't have remained on the board of trade, and we would have been posted, as they call it. The secretary of the board of trade would have reported it if we had failed to pay when called upon, and we would have been posted.

Q. Had you any personal knowledge of any single transaction of Hansen's with your house from the 24th of August down to the time when you ordered his wheat sold, which was in June?

A. Yes, sir; I have personal knowledge.

Q. What was it?

A. I have knowledge of these wheat receipts of Mr. Hansen's, what purported to be receipts for wheat, purporting to be 9,700 bushels of wheat with us. I saw the receipts, his name signed to them.

Q. Then, as far as that is concerned, do I understand you to say that you called for margins from Mr. Hansen?

A. Yes, sir; I told my man to ask Mr. Hansen for margins.

Q. When? You don't remember the date?

112 A. No, sir; I couldn't tell you anything about it. I know I came to the clerk and began to look over the accounts and I saw this account behind, and I immediately instructed my manager to ask this man for margins.

(Witness shown three papers.)

A. Those are the warehouse receipts which he agreed to deliver in Minneapolis.

Q. Is that about the time you directed him to be called on for margins?

A. I presume it is, and afterwards also.

Q. Do you remember distinctly?

A. Yes, sir; I might explain that I telegraphed to Charles E. Handy to have Mr. Hansen put up more margins; that is the way it was done.

Q. That, you think, was just prior to the time of getting these warehouse receipts?

A. I presume so.

Q. What else did you do?

A. I presume I sent a check for these losses to the clearing-house?

Q. These contracts were made with Mr. Handy, were they not?

A. Yes, sir.

Q. Who was the man that came after Handy?

A. Murphy.

Q. You didn't have anything to do with it—I mean personally?

A. No, sir; I never saw Mr. Hansen until today, in my life; never saw him before in my life.

Q. You don't know anything about what the contracts were?

A. No, sir; nothing at all.

Q. You never had anything personally to do with buying or selling a single bushel of wheat?

A. The last order I ordered sold out.

Q. Except that?

A. I think not.

Q. From the beginning to the end you had never made a contract with Mr. Hansen?

A. No, sir.

Q. Early in January, looking at this book, you saw that Hansen's account was behind?

A. I didn't see it; it was told me by the book-keeper; he told me it was behind.

Q. It was from the books?

A. Yes, sir; from the books.

113 Q. You then ordered Handy to demand margins?

A. I ordered Handy to make Mr. Hansen secure his account by more margins; yes, sir.

Q. And the result of that was these warehouse receipts?

A. Yes, sir.

Q. Then, after that, don't you remember of ordering him to put up more margins?

A. I asked him to put up more margins in June or about that—it might be in May—just before the closing out of the last transaction.

Q. I want to ask you right here, as a matter of fact was Mr. Hansen behind on your books in his account on margins at the time that you first made that order which brought out these wheat receipts?

A. The books will show that. I can't tell you that I have no doubt they were or we would not have asked him. We would not have asked him until his account was behind. I couldn't state positively the condition of the books on any particular date, but I am positive that he was never asked for margins unless his account was behind.

Q. Didn't the rules of the board of trade require you to sell out a contract in case the margins are behind?

A. No, sir.

Q. Isn't it the universal practice to do that very same thing and save your customer?

A. No, sir; it is not.

Q. You know he is long, and you know by buying short you can save his account, by buying short; isn't it usual to do that?

A. We never do it without positive instructions from the party.

Q. Do you know of a transfer of May wheat into June?

A. No, sir; not any more than the books will show.

Q. Do you know of 40,000 bushels of wheat which was bought in February and was turned round on your own responsibility—turned into June wheat?

A. We never did it.

Q. Don't you know about that?

A. We never did it on our own responsibility, unless it was stipulated that we should do it.

Q. Do you know of any stipulation of that kind with Hansen?

A. No, sir; I have no knowledge of it.

And on redirect examination this witness further testified:

114 Q. State whether or not you know these to be the rules of the board of trade of the city of Chicago (showing book to witness).

A. I do; they are the rules of the board.

Q. Were those rules in force from the 1st of August, 1888, until the first of July, 1889, which are now contained in that book?

A. Yes, sir; all except one amendment, and that is pasted in there and shows the date.

Q. Will you look at rule four? Has that been changed in any way since that date?

A. No, sir.

Q. Look at rules 21, 22, and 23 and see if they are the same as they were during that time?

A. Yes, sir.

Q. Will you look at the clearing-house regulations, page 113——

A. There is no such page in the book.

Q. Yes, there is—at the bottom page 113—and state whether those clearing-house rules are the same since that date.

A. Yes, sir; there is only one amendment since that time.

Q. And that doesn't touch any of these rules offered in evidence?

A. No, sir.

Plaintiffs' counsel offers in evidence the rules and by-laws of the board of trade of the city of Chicago, being sections 7, 8, and 9, inclusive, of rule IV, on pages 16, 17, and 18; being also rule XXI in full, except section 6, on pages 44 to 51, inclusive; being also rule XXII in full, on pages 51 to 56, inclusive; being also rule XXIII in full, on pages 56 and 57, inclusive.

Received, subject to objection made above to original offer, and read in evidence as follows:

RULE IV.

Powers and Duties of the Board of Directors.

SEC. 7. When any member of the association has failed to comply promptly with the terms of any business contract or obligation and has failed to equitably and satisfactorily adjust and set-
115 tle the same, or when any member has failed to promptly comply with and fulfil the award of any committee of arbitration or committee of appeals, made in conformity with the rules, regulations, and by-laws of the association, he shall, upon admission or proof of such delinquency before the board of directors, be by them suspended from all privileges of the association until all his outstanding obligations to members of the same shall have been adjusted and settled, when he may, upon application, be reinstated. Notice of all applications for relief from suspension under the provisions of this section shall be posted upon the bulletin of the exchange for at least one week prior to the hearing of any such application by the board of directors, when, if no further just claims shall be filed against the said applicant, he may be so reinstated; and if the board of directors shall be satisfied that such failure was merely from financial inability or misfortune, such member, having given satisfactory evidence that he has so adjusted or settled such outstanding obligations, shall be reinstated, and such reinstatement in either case shall thereafter serve as a bar to any further discipline by the association on account of any claims maturing at a date prior to the reinstatement of the said applicant.

SEC. 8. Any member of the association who shall be interested or associated in business with or who shall act as the representative of any organization, firm, or individual engaged in the business of dealing in differences on the fluctuations in the market price of any commodity without a *bona fide* purchase and sale of property for an actual delivery shall be deemed guilty of unmercantile conduct, which renders him unworthy to be a member of the association, and, upon complaint to and conviction thereof by the board of directors, shall be liable to suspension from all privileges of the association for such time as the board of directors may deem proper, and until he shall have given satisfactory evidence that the objec-
tionable connection has been dissolved, and on a second
116 conviction he may be expelled from membership.

SEC. 9. When any member of the association shall be guilty of improper conduct of a personal character in any of the rooms of the association, or when any member shall be guilty of a wilful

violation of any business contract or obligation, and shall neglect or refuse to equitably and satisfactorily adjust and settle the same, or when any member shall wilfully neglect or refuse to comply promptly with the award of any committee of arbitration or committee of appeals, rendered in conformity with the rules, regulations, and by-laws of the association, or when any member shall violate any of the rules, regulations, or by-laws of the association, or when any member shall be guilty of making or reporting any false or fictitious purchases or sales, or when any member shall be guilty of any act of bad faith or any attempt at extortion, or of any other dishonorable or dishonest conduct, he shall be censured, suspended, or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed. A majority of a quorum sitting at a regular or adjourned meeting of the board of directors shall be necessary to censure or suspend, and an affirmative vote of at least twelve members of the board of directors shall be necessary to expel.

RULE XXI.

Regular Deliveries.

SECTION 1. All deliveries upon contracts for grain or flaxseed, unless otherwise expressly provided, shall be made by tender of regular warehouse receipts, which receipts, except in the case of flaxseed, shall have been registered by an officer duly appointed for that purpose. All such warehouse receipts shall be made to run five days from date of delivery, on regular or customary storage charges, which regular or customary charges shall follow such warehouse receipts and be chargeable upon the property
117 covered by the same, and shall be issued by such houses as are in good credit, are conveniently approachable by vessels of ordinary draft, have customary shipping facilities, and are in other respects conformable to such requirements as may be prescribed by the board of directors:

Provided, That the board of directors shall have power, when in their judgment an emergency exists requiring more storage room than can be supplied by the regular elevator wharehouses, to declare any storehouses, vessels, or places suitable for the storage of grain or flaxseed within the city limits, wherein the cost of delivery to vessels or railroad cars shall not be greater than such as is made by the regular elevators for the same service, to be regular places for the storage of grain deliverable under the rules of the board of trade.

SEC. 2. All deliveries of grain and flaxseed in 1,000 and 5,000 bushel lots, of mess pork, lard, or s. p. hams, in 50 and 250 package lots, or of meats in lots of 25,000 and 50,000 pounds in store, on time contracts, after 11 o'clock a. m, shall be made in the exchange hall or in such other place as may be designated by the board of directors, between the hours of 1.30 and 2 o'clock p. m., and shall be made by a notice in writing, which notice shall state on its face the place of business of its issuer. Such notice shall state in detail

the warehouse receipts proposed to be delivered, and, in the case of provisions in packages, or lard, the packer's brand and the contract price on which delivery is proposed to be made; also the net cash value (deducting extra storage) of said property at the market price. At a stated hour each day it shall be the duty of the secretary to post or cause to be posted in a suitable place the market price of such grain or provisions as are deliverable on time contracts. Such delivery notice may be passed from one purchaser to another, before 2 o'clock p. m., by indorsement thereon by the seller of the name of the party to whom it is to be de-
118 livered, together with the contract price at which the property is sold, and also the time at which the delivery is made. The first delivery of such notice shall be made before 1.35 o'clock p. m., and any party holding such notice longer than 5 minutes, as shown by the indorsements on same, of the time of the previous delivery shall not be permitted to deliver it. All delivery notices issued under this rule shall be consectively numbered by the parties issuing them. Notice of readiness to deliver property as herein provided and all subsequent transfers of such notices shall be deemed and held to be a valid and sufficient tender of property on time contracts under the rules of this board of trade, provided the property is actually delivered or is shown to have been ready for delivery in the manner and upon the terms herein provided. It shall be the duty of the party regularly holding such notice at 2 o'clock p. m. to present the same at the office of its issuer before 2.30 o'clock p. m. of the same day, together with a certified check on some Chicago bank in good standing or other satisfactory payment for the net amount due for the property represented by said notice at the market price; and upon tendering said notice with payment at the office of its issuer the holder of such notice shall be entitled to receive the property represented by same. All differences due from or to parties to such delivery shall be paid upon the basis of a full delivery, and no more, and each purchaser receiving notice of delivery shall be responsible to the seller from whom the notice was received for the difference between the price actually paid for the property and their contract price. In cases where the seller's contract price is less than the price actually paid for the property such seller shall be responsible to the purchaser to whom he delivered the notice for the difference. All such differences shall be due and payable immediately upon the delivery and payment for the actual property, it being the duty of each person transferring the delivery notice to ascertain
119 what price was actually paid for the property. On the first business day of each month all deliveries on time contracts of the kinds of property mentioned in this section, if delivered before 11 o'clock a. m., shall be delivered in the exchange hall or such other place as may be designated by the board of directors between the hours of 9 and 10 o'clock a. m. in the same manner and under the same regulations, except as hereinafter provided, as is specified for similar deliveries after 11 o'clock. The delivery notice shall be of the same form and character in all respects as that prescribed for

deliveries between 1.30 and 2 o'clock, except that it shall state the net value (deducting extra storage) of the property at the closing market price on the last business day of the previous month for the delivery on which the property is tendered, which price shall be posted on the bulletin-board of the settlement-room immediately after the close of the market. The first delivery of the notice shall not be later than 9.10 o'clock, and it shall be the duty of the party regularly holding such notice at 10 o'clock to present the same at the office of its issuer before 11.30 o'clock a. m. of the same day, together with a certified check on some Chicago bank in good standing or other satisfactory payment for the net amount due for the property represented by said notice, as hereinbefore provided, and upon tendering said notice with payment at the office of the issuer, the holder of such notice shall be entitled to receive the property represented by the same.

All differences between the price paid for the property and any contract prices involved in its delivery due to or from parties to such delivery shall be adjusted and paid in the same manner and with the same liabilities as in the case of delivery made under this section between 1.30 and 2 o'clock p. m. In case property represented by either of the delivery notices mentioned in this section is not called and paid for as herein provided it may be held by the issuer of
120 the notice for and at the expense for storage, interest, insurance, or other risk of the party whom it may concern until 12 o'clock m. of the next business day, at which time it shall be sold in open market for account of whom it may concern, or it may be sold, if the notice was delivered before 10 o'clock a. m., at any time between 12.30 o'clock p. m. of that day and 12 o'clock m. of the next business day. If the notice was delivered between 1.30 and 2 o'clock p. m. it may be sold at any time between the beginning of trading hours and 12 o'clock m. of the next business day. The party holding the property shall, however, notify the party to whom he delivered the original delivery notice before 2 o'clock of the same day of the default if the delivery notice was delivered before 10 o'clock a. m., or before 4 o'clock p. m. if the delivery notice was delivered between 1.30 and 2 o'clock p. m., such notice of default to be in writing, and each purchaser receiving said notice of default shall in turn deliver the same without delay to the party to whom he passed the original notice of proposed delivery.

All expense and risk of carrying property defaulted on, including a commission of one-quarter of one cent per bushel on grain and one-quarter of one per cent on the market value of provisions, shall be payable to the party required to make resale by the party to whom he had the property sold, he to be reimbursed by the one to whom he delivered the notice of delivery, and so on until it is finally paid by the party in default, and in case of such default and resale of property all differences shall be adjusted, as hereinbefore provided, on the basis of the price at which the property shall have been resold.

All parties having property due them on time sales shall be present or shall be represented by an authorized employé in the

exchange hall or such other place as may be designated by the board of directors between the hours of 1.30 and 2 o'clock p. m. of each business day and on the first business day of each month between the hours of 9 and 10 o'clock a. m., and admission to
121 the exchange hall or such other place as may be designated by the board of directors shall be denied all parties after 1.30 or 9 o'clock, as the case may be. In order to carry out the provisions of this section, as it relates to deliveries by notice between 9 and 10 o'clock a. m. on the first business day of each month, the time for opening exchange hall for the general admission of members and for the commencement of the hours for trading, as prescribed by these rules, shall on such days be delayed one hour. Any property which cannot be delivered, owing to the absence of the buyer from the exchange hall or such other place as the directors may have designated for the purpose of delivery, may be sold out by the party having same sold to such absentee, as hereinbefore provided in cases of default; all expenses and risk of carrying the property, commission, etc., shall be paid by the absentee, the same as in case of default: Provided, however, such property shall not be sold until the absentee has had notice in writing, either delivered to him in person, to his business representative at his place of business, or left at the secretary's office in case he has no regular place of business, that the property was ready for delivery under this rule on his contract. In case it should appear on complaint duly made to the board of directors that any member has been guilty of issuing a notice of readiness to deliver property, as herein provided, who had not the property mentioned in such notice in his control or possession at the time of issuing such notice, or, having issued such notice, shall thereafter dispose of the property except as herein provided, or who refuses to deliver up such property when demanded, as provided for under this rule, such party shall be deemed guilty of gross fraud, and may be suspended or expelled from membership in the association under the provisions of rule IV.

SEC. 3. The board of directors may prescribe all necessary regulations and requirements for warehousing all kinds of property (other than grain) deliverable by warehouse receipts.

122 SEC. 4. It shall be the duty of the board of directors under this rule to publish annually or oftener, if necessary, by posting on the bulletin of the exchange the names of all elevators and other warehouses conforming in all respects to prescribed requirements of the said board, and to report immediately to the association, by posting as above, any irregularity in the management of such elevators or warehouses or any fact calculated to discredit or impair the value of warehouse receipts of any such elevators or warehouses as the same shall come to their knowledge.

SEC. 5. All warehouse receipts for property tendered or delivered on contracts shall be for quantities or parcels, in the aggregate, as sold, accompanied by a memorandum of the property delivered, with the price of the same, together with the amount due therefor, provided on all time contracts of five thousand (5,000) bushels of grain or flaxseed or any multiple thereof deliveries shall be made

in lots of five thousand (5,000) bushels; and on all time contracts for mess pork, sweet-pickled hams, or lard for two hundred and fifty (250) packages or any multiple thereof deliveries shall be made in lots of two hundred and fifty (250) packages; and on all time contracts for fifty thousand (50,000) pounds of meat or any multiple thereof deliveries shall be made in lots of fifty thousand (50,000) pounds; and on all time contracts for one thousand (1,000) bushels of grain or flaxseed or any multiple thereof, except as provided above, deliveries shall be made in lots of one thousand (1,000) bushels; and on all time contracts for mess pork, sweet-pickled hams, or lard for fifty (50) packages or any multiple thereof, except as provided above, deliveries shall be made in lots of fifty (50) packages; and on all time contracts for twenty-five thousand (25,000) pounds of meats or any multiple thereof, except as provided above, deliveries shall be made in lots of twenty-five thousand (25,000) pounds. A variation, however, of one per cent. in the quantity of grain or flaxseed delivered and that contracted for shall not vitiate
123 a tender of delivery. Any excess or deficit within the above limits shall be settled for at the current market.

RULE XXII.

Rights of Parties on Contracts.

SECTION 1. On time contracts made between members of the association, where property is bought deliverable on the buyer's demand within a specified time, the time of delivery shall be as follows: When demand for the property is made by the buyer before 12 o'clock m. the property shall be due and deliverable before 2 o'clock p. m. same day; when the demand is made after 12 o'clock m. the property shall be due and deliverable before 2 o'clock same day or before 11 o'clock a. m. next day, or the buyer may specify any particular future day during the time when the property is deliverable upon which the property shall be delivered, and the property shall be delivered before 11 o'clock on the day designated, provided no demand shall be made before the beginning of the time specified when it may be made, and if no demand is made the property shall be deliverable before 2 o'clock p. m. on the day of maturity of contract, and provided also that all deliveries after 11 o'clock a. m. shall be made under the provisions of section 2 of rule XXI.

SEC. 2. On contracts for property deliverable at the pleasure of the seller within a specified time the seller may deliver the property on any day during such time between the hours of 9 and 11 o'clock a. m. or between the hours of 1.30 and 2 p. m., as provided by section 2 of rule XXI.

SEC. 3. On contracts for grain or flaxseed for future delivery the tender of a higher grade of the same kind of grain or flaxseed than the one contracted for shall be deemed sufficient. All contracts made for wheat hereafter, unless otherwise specified, shall be understood as for No. 2 wheat, and on such contracts a tender of

either or both No. 2 spring and No. 2 red winter and higher
124 grades of each or a tender in part of one kind and in part
of the other, making the amount required by the contract, shall be deemed sufficient.

SEC. 4. When a contract shall mature on Sunday or on a legal holiday delivery on such contract shall be made on the preceding business day. No property shall be tendered on any day upon which the association shall hold no business session.

SEC. 5. On contracts for grain sold in store without special agreement as to delivery the property shall be deliverable before 2.30 o'clock p. m. of the day of sale or before 11 o'clock a. m. of the next business day. In case a purchase is specified as for cash it shall, if purchased before 1.15 p. m., be deliverable before 2.30 o'clock same day. No property shall be tendered between the hours of 11 a. m. and 1.15 p. m. except by special agreement. All deliveries under this section on Saturday shall be made before 2 o'clock p. m. In case of the tender of property during the temporary absence of the purchaser from his place of business notice of such tender shall be left at his office, and he shall have the right to call for the same and pay for it within one hour thereafter.

SEC. 6. In case it shall appear that the delivery of any outstanding trade or contract between members of the association may be offset by some other corresponding trade or contract made by the parties with other members of the association, and the parties to such trade or contract or their authorized agents consent to such offset, such trade or contract shall be deemed to have been settled, and any balance between the current market value of the property covered by such trade or contract and the several contract prices shall be due and payable immediately by the party from whom such balance may be due to the party entitled to receive the same under his contract. The current market value of the property contracted for shall be conspicuously posted at a stated hour each day, under the direction of the board of directors, in the exchange hall
and in the settlement-room of the board; which posting shall
125 serve as a basis for the adjustment of all contracts settled as herein provided on that day.

In order to facilitate the operation of this section each member is required to keep a settlement book, in which shall be entered the names of parties with whom settlements have been made, and the dates and terms of the trades included in such settlements, and the terms of such settlements, and the prices at which the commodities were originally sold or purchased, and the amounts due to or from him or them on each separate settlement, also the net amount due to or from him or them on all settlements, and the board of directors is hereby authorized to provide a suitable office with the necessary employés, to which members shall be required, at stated hours each day, to make reports showing the net balance due to or from each member as shown by such settlement book, and also the general balance due to or from him or them upon all such settlements, each report to be accompanied with an acceptable check for the aggregate of balances, if any, due from him or them on the con-

tracts so settled; whereupon, if said report is found to be correct as compared with other reports rendered him, the person in charge of said office shall, at a stated hour each day, pay to each of the parties making such reports any balances which he may have collected and which shall appear to be due to them by said reports, less such charges as shall be prescribed by the board of directors as compensation for the services of said office.

SEC. 7. It shall be the duty of each member or firm making a transaction for future delivery of grain in 5,000 or 1,000 bushel lots, lard and pork in 250 or 50 package lots, and short ribs in lots of 50,000 or 25,000 pounds, under the rules of the association, to confirm such transaction by sending to the clearing-house a memorandum of the same by 6 o'clock p. m. of the day on which it is made; such memorandum shall be in writing and shall state on its face the date of the transaction, the quantity and kind of
126 property covered by the same, the month of delivery, the price, and the name of the party to whom sold or of whom bought, and shall be signed by the party or firm making the same. All transactions of the same date made with any member or firm may be included in one memorandum, and all such memoranda shall be sent to the clearing-house by the member or firm making the same in sealed envelopes, addressed to the member or firm with whom such transactions were made. It shall be the duty of the clearing-house manager to assort and have ready for delivery by 3 o'clock a. m. of the following day and to deliver, on application, all envelopes containing such memoranda as are left with him in compliance with this section. In order to enforce this section it is hereby provided that any member or firm failing to comply with its provisions shall be fined $5 for each offense, and for repeated offenses they may be disciplined by the directors under the provisions of section 9 of rule IV.

SEC. 8. It shall be the duty of each member or firm making an offset of any outstanding contract for future delivery to confirm the same by sending to the clearing-house a memoranda of the same by 6 o'clock p. m. of the day on which it is made; such memorandum shall be in writing and shall state on its face the date of the offset and the amount proposed to be paid or collected. When several offsets have been made on any one day the memorandum shall state the net amount only of the proposed payments or collections; such memoranda shall be sent to the clearing-house by the member or firm making the same in sealed envelopes, addressed to the member or firm with whom such transactions were made. It shall be the duty of the clearing-house manager to assort and have ready for delivery by 8 o'clock a. m. of the following day and to deliver, on application, all envelopes containing such memoranda as are left with him in compliance with this section. In order to enforce this section it is hereby provided that any member or
127 firm failing to comply with its provisions shall be fined $5 for each offense, and for repeated offenses they may be disciplined by the directors under the provisions of section 9 of rule IV.

SEC. 9. In case any member of this association, acting as a com-

mission merchant, shall have made a purchase or sale by order and for account of another, whether the party for whom any such purchase or sale was made be a member of this association or not, said member shall be deemed authorized to settle such contract through the exchange clearing-house of this association and under the rules and regulations relating to such clearing-house, and the board of directors of this association are authorized to establish rules and regulations governing the exchange clearing-house of this association, and to change, add to, or modify such rules and regulations from time to time. In case any member of this association, acting as a commission merchant, shall have made purchases or sales by order and for account of another, whether the party of whom such purchase or sale was made be a member of this association or not, such order shall be deemed to have been made with reference to and to be executed and carried out in all respects under the rules, regulations, and customs of this association (including the exchange clearing-house regulations) the same as though they were in terms incorporated into such order, provided that in case of substitution of one contract for another or of offsets or settlements of contracts, in pursuance of such rules, regulations, or customs the member or firm making the same shall be held to guaranty to his or their principal the ultimate fulfillment of the original contract made under such order, and the principal also continuing liable on such original contract the same as though no substitution, offset, or settlement were made.

SEC. 10. In all sales of grain or flaxseed for future delivery or for transfers to Eastern railroads by car-loads, a car-load shall be deemed to contain twenty-four thousand (24,000) pounds. In case
128 property of any kind is weighed by a public or disinterested weigher and is paid for by such weights, the cost of such weighing shall be divided equally between the buyer and seller.

RULE XXIII.

Failure to Deliver or Receive on Contracts.

SECTION 1. In case any property contracted for future delivery is not delivered at maturity of contract, the purchaser may, if he shall so elect, consider the contract forfeited, or he may purchase the property on the market for account of the seller by 1.15 o'clock of the next business day, notifying him at once of such purchase, or he may require a settlement with the seller at the average market price on the day of maturity of contract, and any damages or loss due to the purchaser by reason of such purchase or declared settlement shall be due and payable by the seller immediately.

SEC. 2. In case any property contracted for future delivery is not received and paid for when properly tendered, it shall be the duty of the seller, in order to establish any claim on the purchaser, to sell it on the market at any time during the next twenty-four hours, at his discretion, after such default shall have been made, notifying the purchaser within one hour of such sale, and any loss resulting to the seller shall be paid by the party in default.

Plaintiffs' counsel also offered in evidence regulations of the Chicago board of trade clearing-house in full, being regulations 1 to 11, inclusive, as contained on pages 113 and 114.

Received subject to objection made to original offer and read in evidence as follows:

129 *Regulations of the Chicago Board of Trade Clearing-house.*

I.

The style and address of all business houses making clearing must be registered at the clearing-house and any subsequent change in address reported.

II.

Printed reports to show the net balances, as provided in general rules No. XXII, section 6, paragraph 2, must be obtained at the clearing-house.

III.

Parties whose reports shall show a net balance against them shall accompany the report with a check for the said net balance, made payable to the order of Chicago board of trade clearing-house. Such check must be certified, under penalty of a fine of one dollar. No money will be accepted, but the checks of the clearing-house may be used in payment of balances.

IV.

All reports must be in the clearing-house by 11 a. m. of each business day, under penalty of a fine of five dollars if tardy and the posting of the delinquent party on 'change at 12 m.

V.

Parties having no items to clear must so report in writing, under penalty of a fine of one dollar for neglect of such report, and parties whose reports may be equal on both sides and those whose reports show a credit balance must put them in the clearing-house, under penalty as provided in art. IV above.

N. B.—To insure accuracy and expedite the clearings parties must be sure the amounts claimed are mutually agreed upon as cor-
130 rect. A penalty of one dollar will be collected of any party claiming from or allowing to another party a wrong amount, and also for each error in footing or subtraction. All doubtful items must be excluded from the report.

VI.

If a claim is not allowed in his report by the debtor party, the claimant must, on notice thereof, immediately pay the amount to the clearing-house.

VII.

In case a party in his report allows another party an amount in excess of that claimed by the second party, the excess will be refunded to the first party.

VIII.

The charge for clearing, as provided by the rules, has been fixed at one cent for each item in each report, the same to be paid monthly on presentation of the bill by the clearing-house; fines to be paid at time of notification that the same have been incurred, under penalty of the withholding of the next amount due such debtor or reporting the delinquency to the board of directors.

IX.

Parties whose reports show a net balance in their favor may call for check after 2.30 p. m.

X.

No reports shall be amended after 11 a. m.

XI.

Office hours shall be from 9. a. m. to 3.30 p. m.

These rules having been read in evidence, this witness further testified:

131 Q. I wish you would state—you have already stated that these transactions were made by you in pursuance of and under the rules of the board of trade that are now offered in evidence. I wish you would state the manner in which trades are settled, if you know, losses paid or profits collected, through the clearing-house system of the board.

Objected to as immaterial, incompetent, and irrelevant.
Objection overruled. Defendant excepts.

A. The rules of the board of trade provide *that* the way of settlement in a certain way, which is as follows: We will suppose I buy 10,000 bushels of wheat of "A" and sell it to "B" and "B" sells it back to me at a different price. According to the rules of the board of trade that settlement is made through the clearing-house and the balance is struck and one trade offsets the other. We may have 50 customers on our books and half of them may make a profit on their sales or purchases and the other half may make a loss in the same way. If these amounts were exactly equal of course they would offset one another and there would be no difference. But if the profits of one-half of the customers exceeded the losses of the other half we would receive the balance through the clearing-house, and in the same way, if the losses of part of our customers exceeded the profits made by the others, we should have to pay the clearing-

house the difference, because, of course, one party might make more profit or loss than the others.

Q. Now take this matter of Mr. Hanson's and apply it to these rules and explain how it would be done; I mean through the clearing-house.

A. Suppose he made a loss on this transaction or any of them. While at the time I was paying that loss as a matter of fact I received money through the clearing-house; it would be because some other customer had made more profits than he had lost, and so the whole transactions for that day might show a gain, but his loss would have been paid through the clearing-house.

132 Q. Simply because all the losses were less than all the gains?

A. Yes, sir.

Q. But you would have to pay Mr. Hanson's loss all the same through the clearing-house?

A. Yes, sir. We are required every day to put into the clearing-house a statement of the different trades, showing amount owing the clearing-house and amount owed us by the clearing-house.

Q. All the moneys in the various statements that have been rendered to Hanson where there was a loss you paid it to the clearing-house and where there was a profit you received it from the clearing-house?

Objected to as immaterial, incompetent, and irrelevant.

Objection overruled. Defendant excepts.

A. Yes, sir. I don't speak of my own knowledge, except that very often I have signed checks to pay the clearing-house and have signed checks received from it. I can only tell from the books. I don't know any particular accounts or any particular days.

Q. State whether, in the usual course of business, every one of these transactions went through the clearing-house.

A. Yes, sir; every one of those transactions went through the clearing-house.

Q. Has Mr. Hansen ever paid the balance to you?

A. No, sir.

Q. Or any part of it?

A. No, sir.

Q. The commission on these transactions *were* one-eighth of a cent per bushel. State whether that was the regular commission.

A. Yes, sir.

Q. And that amounted to $631.25 for all of these transactions?

A. That is what the book-keeper tells me.

Q. Will you state what you did as a commission merchant acting for Hansen, the defendant in this action, in any one of these transactions—what you did for him—what you performed for him on the board of trade? Take for illustration one of these pur-

133 chases of wheat; state it from the beginning to the end of this transaction, just what steps you did take on his account.

The COURT:

Q. Will the witness take one of the trading cards and explain to the jury the *modus operandi* of transacting that business?

Witness takes "Exhibit T" from deposition of Rob't Pringle.

Q. That was a purchase?

A. Yes, sir.

Q. Now, begin with the contract and just state what occurred; you take the card and explain it.

Q. What is the first thing that is done before it goes on the card?

A. The first thing that is done, we receive the order to buy or sell the wheat for some customer. We must have received the order to purchase this wheat from Mr. Hansen through Mr. Handy or some other agent. Their telegraph dispatch was received by a young man whom we had on the floor to receive telegraphic dispatches and to see that the orders were filled. That telegraph dispatch would be handed to the broker of the wheat pit or it would be received by the broker himself and time noted on it, and then he buys 5,000 bushels of May wheat from some commission merchant; in this case from Mr. Rollins, at 97⅜ cents. He then immediately notifies the agent of the customer—in this case, Mr. Handy—that he has bought for Mr. Hansen—I suppose possibly Mr. Hansen—and then this card is sent to the office.

Q. Do you find a trading card that shows that wheat was bought for January?

A. There is a transaction, I think, for January. If we had 5,000 bushels bought for January the commission merchant who sold us that wheat had a right to deliver us that wheat at any time between the first and last day of January, inclusive, and we were compelled to receive it and pay for it when he offered it to us, at certain stated hours—at any time in proper hours.

Q. What did become of that?

A. It was received and paid for.

134 Q. By you?

A. By us.

Q. On account of Mr. Hansen?

A. Yes, sir; on account of Mr. Hansen.

Q. In three of these May purchases the trading card shows there was a counter-sale made.

A. In three of them.

Q. If you bought and sold an equal number of bushels—if you bought for May delivery and sold for May delivery a like quantity, what would be done in that kind of a transaction?

A. If I bought 5,000 bushels of wheat for May delivery and sold 5,000 for May delivery?

Q. Yes.

A. If I bought 5,000 bushels of wheat for may delivery, the commission merchant who sold it to me could deliver it to me at any time during that month; he could deliver it the very day it was sold if he saw fit; he had the option or privilege of delivering it at any time during the month. After a sale or purchase of May

wheat, the wheat can be delivered at any time during the month, wheat sold in May in the wheat pit at the seller's option—that is, the wheat may be delivered at any time during the month and must be delivered during the month. There are some sales made at buyer's option; then the buyer has a right to demand that wheat at any time during the month, but those are exceptional cases where they make buyer's option.

Q. There are a good many trades made seller the year?

A. Yes, sir.

Q. What are they?

A. That is where the seller has the whole year in which to deliver.

Q. In point of fact you do receive grain in your office to be delivered to customers?

A. Yes, sir.

Q. How much actual grain did you actually receive from customers, actual cash delivery, at any one time during all these transactions for Mr. Hansen?

Objected to as immaterial.

The COURT:

135 Q. You speak about making delivery in May; is there any option whereby the seller pays the difference between the market price and the contract price in May?

A. No, sir; the contract is not closed until the wheat is delivered; he has got to deliver the wheat.

The COURT:

Q. Can't he at any time—you say he has got the whole month to make the delivery to you as the agent of Hansen of 5,000 bushels of wheat; isn't that an option to deliver that wheat or to pay the difference between the contract price and the market price at any time during the month?

A. No, sir; you can't make a contract of that kind. He must say, I will buy of you so much wheat, and if it is sold to him he has got to sell it to a buyer, an option buyer, and then the clearing-house settles with him. He can't come and say, I will pay you the difference, because that would not be according to the rules of the board. He must sell it to a buyer on the option market, and then it goes clear through the clearing-house.

Q. Didn't you say that one trade would offset the other?

A. Yes, sir.

Q. That is, in cases where there is a buyer and a seller of equal amounts for the same month?

A. Yes, sir.

Q. That is to save time, and in place of going through the useless formality of you delivering to him and he delivering to you?

A. Yes, sir.

Mr. KIRTON: Now I will urge my last question. How much actual grain did you actually receive from customers at any one time during all these transactions for Mr. Hansen?

Objected to as immaterial and incompetent.

The COURT: I don't see what it has to do with the transaction; I don't think it is proper.

Objection sustained.

Q. Will you explain a little more fully than you did the manner in which these losses are paid through the clearing-house—what is the clearing-house?

136 Objected to, the rules of the clearing-house being the best evidence.

The COURT: I think he may explain about it.

Q. Explain fully about the clearing-house.

A. It is an office in the board of trade building, governed, I believe, by the president and secretary of the board, to receive accounts of all trades made on the board of trade, to settle all balances between the members without the members going through the formality of paying to each other or receiving from each member the amount due or owing to him. A balance is struck by the secretary of the amount to be paid to or received from each member. It is for the purpose of facilitating business.

The COURT: A general agency of the whole board?

A. Yes, sir; a general agency of the whole board. It would be impossible to do the board of trade business unless there was such an office as this. It would be simply impossible for the members to transact business without it.

Q. Were it not for the scheme that you have there to settle how would you have to settle?

A. We would have to settle with each individual commissionman.

Q. Go to the office of each individual commissionman?

A. Yes, sir; go to their office and settle with each individual commissionman.

Q. Whereas now you go to one place that collects all accounts and attends to business and figures it out, and you settle on the differences?

A. As it is we make out what is called a clearing-house sheet. That sheet shows what we owe every customer and what every customer owes you with whom we had business that day, all contracts that have been settled that day; it shows what each of them is, and we strike a balance showing which way the account is. That sheet must be put in before a certain hour, under penalty of a fine if it is not in in time, and there is also a penalty of a
137 fine if it is incorrect as to the balance to be paid or received by us. We never see the commissionmen; the clearing-house does the business for us.

Q. When you have 5,000 bushels of January wheat sold for delivery you have a right to deliver it at any time during the month of January?

A. Yes, sir.

Q. How did you act in regard to that contract in your clearing-house accounts—what did you do?

A. They don't go through the clearing-house. When we receive wheat we have to give a certified check for it, and if we deliver that wheat they must give us a certified check for it.

Q. What does go through the clearing-house?

A. Just trades between members that have been settled for that day.

Q. It would be the same if you had 5,000 bushels bought for January and it was delivered to you?

A. If it was delivered to us we would have to give a certified check for 5,000 bushels on or before a certain hour that day, or else a secretary would report that we had failed to respond, and we would be put off the board.

Q. But that would not go through the clearing-house?

A. No, sir; it would not.

A JUROR: As I understand it, checks paid for wheat on delivery do not go through the clearing-house at all.

Mr. KIRTON: No.

A. The clearing-house has no sheet that shows balances due or owing to the various customers.

Q. But these customers are considered as represented by brokers, and each broker furnishes a sheet?

A. The clearing-house don't know anything about outside parties; they only know the commission merchant.

Q. They simply recognize the commission merchant and broker?

A. Yes, sir.

Q. So the clearing-house in that way simply settles the balance between the brokers?

A. Yes, sir.

138 Q. Where are these sheets that relate to Hansen's account?

A. I suppose there are sheets in our office and sheets in the clearing-house that could be had.

Q. Could you get certified copies of them?

A. Yes, sir; but I want you to understand that Mr. Hansen's name does not appear on the sheet; it is the member of the board doing business whose name appears on these sheets and not Mr. Hansen's. These clearing-house sheets designate what deals have taken place to go through the clearing-house as between one member of the board of trade and another.

Q. Nothing about Hansen?

A. No, sir; not a thing.

Q. Was there nothing on that sheet that showed it had reference to Hansen?

A. No, sir; the clearing-house sheet- had no relation to Hansen;

they were made out for the other commissionmen and members of the board.

Q. Then the clearing-house recognizes brokers alone?

A. Members of the board alone.

Q. These sheets refer to transactions made by brokers?

A. Yes, sir.

And on recross-examination the witness further testified:

Q. That is all that is done. I understand you to say that when actual wheat is delivered, for instance, cash wheat, that don't go to the clearing-house?

A. We give a certified check for that.

Q. You give a certified check to whom?

A. To the party who shows the wheat in his favor.

Q. It don't go through the clearing-house?

A. It might go through the clearing-house, too.

Q. Do you know it does?

A. No; I do not.

Q. Do you, in any instance in the Hansen case, know, of your own knowledge personally, that there was a certified check given for wheat actually delivered?

A. No, sir; not of my own knowledge.

139 Q. I understand you have taken great pains, under instructions from your counsel, to state one feature of this contract to illustrate it, and we finally drifted into the general proposition after all. Suppose that if, in November, you buy from A 10,000 bushels of May wheat—that is, May, 1889; in November, 1888, you buy 10,000 bushels of wheat for future delivery, May, 1889, wheat. Now when May arrived that contract, if it is made under the rules of the board of trade, would require the purchaser to receive that wheat at the seller's option some time during the month of May?

A. Any day during the month of May.

Q. That is all very good; but I notice in all these transactions, except possibly that June transaction, you never carried a bushel of May wheat to May.

A. For Mr. Hanson?

Q. Yes.

A. There was some wheat carried for Mr. Hanson in May.

Q. No, sir.

A. I think there was. I am not positive about it. I think there was some carried; we hadn't sold it previous to that.

Q. In examining the reports I can't make it out. I suppose the reports have been verified by counsel; we will take this as correct. Look that over.

A. I would say that there was 40,000 bushels of May carried down to April.

Q. I think, under your own directions, on the 29th of April that wheat was turned into June wheat, so that there was not a single instance where out of thousands and thousands of bushels of May

wheat that were bought did you carry one bushel to May; no-one. I think the record will verify that. So far as all that May wheat is concerned, it never came within the operation of the rule you refer to, assuming it was not carried into May.

A. I don't know whether it was carried into May.

Q. Supposing that contract is not carried until May.

A. You use the word carried in an entirely different sense from what we do. What I mean by carrying wheat, when wheat or a receipt for wheat is offered to us and we pay for it, that is carrying it.

The contract is not matured until the first day of May.
140 After the first day of May until the last day of May it is the privilege of the seller to deliver the wheat; then we take it in and carry it, or, in other words, we pay for it. That is what we mean by carrying.

Q. Suppose this contract for May wheat is not closed out before the first of May.

A. If Mr. Hansen orders his contract for May wheat closed out before the first of May we close out the contract. In May these parties may deliver this wheat to us, and we must take it in and then deliver it to some one else, even if Mr. Hansen orders his wheat sold on the 29th of April.

Q. Never mind. I understand that Mr. Hansen had the right to order you to sell—to close out the deal.

A. He certainly had the right to order it, and we would obey his order to the best of our power.

Q. As far as Mr. Hansen is concerned, if Mr. Hansen's orders were to close out this contract, if you couldn't close it out what did you close?

A. We could close it out; we could sell the wheat on the board of trade.

Q. What do you sell, the contract or the wheat?

A. We sold the wheat for May delivery. If Mr. Hansen orders us to sell 40,000 bushels of wheat for May delivery we would sell it to one or more customers, or 400,000 bushels either; or parties might deliver us this wheat and we might pay for it and sell it to other parties.

Q. Did you do that in Hansen's case?

A. I don't know whether it was done in Hansen's case; it was done in thousands of cases.

Q. Do you know of a single instance in Hansen's case when May wheat was sold and the money collected on it and received for the May wheat?

A. I don't know whether it was or not.

Q. Do you know it was?

A. No, sir; I don't.

Q. You close out his deal, and then when you close out that deal you sell wheat you call May wheat, although you have not
141 got it?

A. We sell wheat for May delivery.

Q. But none of the wheat that was bought in November had ever been delivered to you, so you didn't sell that wheat?

A. Yes, sir; we might have wheat delivered to us in November.

Q. Suppose it was not delivered.

A. If we sell wheat we must deliver it.

Q. But if the May wheat bought in November was not delivered there was nothing subsisting except the contract; before the first of May, you say, you could close out the deal?

A. He could; I was ordered to do so.

Q. When you closed out that deal what did you do?

A. I sell whatever amount of wheat would cover the amount he purchased or whatever amount he sees fit to order us to sell.

Q. He makes a contract for the sale?

A. Yes, sir.

Q. You say you sell 10,000 bushels of May wheat for Hansen?

A. Wheat for May delivery.

Q. You have bought 10,000 bushels in November for May delivery, and pretty soon the market commences to jump down. Would you sell that wheat for Hansen?

A. We would sell it if he tells us to.

Q. You sell the wheat when you get his orders?

A. Yes, sir.

Q. He could have bought 10,000 bushels or, rather, he could have sold 10,000 bushels to offset the 10,000 bushels bought?

A. Yes; but it is subject to delivery.

Q. When that is done—I see that your reports show that when you sold or bought you buy, say, at 96, and you carry out the amount of the cost of that wheat in November at 96?

A. Yes, sir; the report shows that.

Q. When you sold in January at a dollar you carry out the cost of that amount of wheat at a dollar?

A. Yes, sir.

Q. And you carry out at the time the commission of $\frac{1}{8}$ a cent a bushel, and you take the difference between 96 and a dollar; you carry that into your report to Hansen—the net gain or profit—into his account?

A. Yes, sir.

142 Q. That is what you do?

A. Yes, sir; that is customary with commission merchants when trades are made in that way.

Q. That is what you actually do?

A. Yes, sir.

Q. Then you send these transactions up to the clearing-house with the name of your broker doing business there?

A. Yes, sir; but that particular trade might have been settled a month previous or it might have been settled a month later on.

Q. No matter when it was settled, you report that trade—net gain so much—and that goes onto your option book?

A. No, sir; goes onto the journal.

Q. Don't it go onto your statement for the clearing-house?

A. It goes on at the time it was settled; it might not have been settled that day.

Q. You say that all deals are required to be settled within twenty-four hours?

A. Yes, sir; every day.

Q. Here is a gain?

A. Yes, sir.

Q. The clearing-house scoops in the whole machinery?

A. That particular transaction?

Q. Yes.

A. That might have been settled that day or it might have been settled previous to that. It might have been settled or offset previous to that or it might have been offset a month later, when it is offset by some other trades, when parties would purchase wheat to the same amount of the same delivery.

Q. No, I guess not; you have already bought 10,000 bushels for Hansen?

A. Yes, sir.

Q. You have already made a profit of four cents on 10,000 bushels of grain?

A. Yes, sir; four cents.

Q. How is that deal closed?

A. It is closed, as far as Mr. Hansen is concerned, by the parties to whom we sold this 10,000 bushels taking that wheat. That trade might not have been settled through the clearing-house for one month or two months; but we settled it with Mr. Hansen right at the time.

Q. Then it wouldn't go through the clearing-house at all?

143 A. Yes, sir; that would go through the clearing-house.

Q. If you sell that wheat today and make a settlement of this Hansen deal, would that go through the clearing-house?

A. Yes, sir.

And this witness, further testifying as to payments by the plaintiffs of the moneys claimed by them in this action, testified as follows:

Q. One of your witnesses has stated that these things were paid through the clearing-house, and it appears that altogether you have paid $300,000?

A. Yes, sir; indebtedness of various accounts, and among them Hansen's.

Q. Who is right, you or your clerk?

A. I am right. I don't know what my clerk says.

Q. Then it is a fact that these accounts of Mr. Hansen's were paid to the clearing-house?

A. Yes, sir.

Q. Were these deals settled in the clearing-house before this action was commenced?

A. Not all, not all before this action was commenced. This action was commenced, I guess, the 10th of June. We were in business until the 1st of July. Some of these trades might not have been settled until that time.

Q. Then perhaps these trades in controversy might never have

been in the clearing-house at the time that this action was commenced.

A. Some of the trades might not have been settled in the clearing-house until afterwards, because we kept on with the business until the first of July.

Q. When did you sell the wheat for Mr. Hansen?

A. In June.

Q. Up to what time will you state in your evidence that these transactions with Hansen went to the clearing-house?

A. They all went through the clearing-house before the first of July last.

Q. They all went through the clearing-house before the first day of July last?

A. Yes, sir; that is when we quit business.

144 Q. Will you swear that they did all go through the clearing-house before the 9th of June?

A. That I can't say. I think not, because on the 9th day of June we sold some wheat.

Q. Then that June sale you report here was not in the clearing-house, going through it, at the time this suit was commenced?

A. I do not know as to that; I cannot tell you whether it was all sold.

Q. I call your attention to it because it is of considerable importance. I want to know when your deals closed in February would they go through the clearing-house before this action was brought.

A. I presume they were long before that.

Q. In every case where a deal did go through the clearing-house, then, in that case, the brokers of whom you bought for Hansen and brokers to whom you sold for Hansen would adjust their accounts in the clearing-house with respect to losses and gains on the deals with you?

A. I explained to you I either paid it myself, in substance, or——

Q. I will ask you whether or not there would not be an acceptance of a gain or payment of a loss by the brokers who acted for all the parties with whom you were dealing by their filing their statement and receiving or paying these checks for the balances at the clearing-house.

A. The brokers, of course, receive their balances every day.

Q. As late as February, this deal that was closed in February, or would this include April?

A. Yes, sir.

Q. Would your April business go through the clearing-house before this action was commenced?

A. Yes, sir; I presume long before.

Q. I understand you to say that where you had closed a deal that all deals in this case closed down as late as the month of April would necessarily have gone to the clearing-house under the system you have spoken of?

A. Yes, sir.

Q. The brokers of whom you bought or to whom you sold had filed their statements?

A. Yes, sir.

Q. And you got together, or the clearing-house, acting for
145 you as brokers, had adjusted your accounts and cleared them?

A. Yes, sir.

Q. So that these things which you put into your report as gains and losses, the natural theory would be that they had passed the clearing-house?

A. No doubt but they had on the day, probably, that the trade was made.

Q. I am not speaking about that, but as late as February.

A. Yes, sir.

Q. So that every one of these deals closed as late as April, including April, had passed the clearing-house, and the losses and gains had been settled between you and the brokers for all the parties?

A. I presume they had.

Q. That is your theory of it?

A. Yes, sir.

Q. Now, what I want to know is—you said you had a right to sell for Hansen, but if you did sell it would close the deal, but if it was closed at a loss or at a profit it would go to the clearing-house; it would be conclusive upon all you brokers.

A. I said we had a right to sell for him or to buy for him if he instructed us to do so. We had no right to buy or sell for him unless he instructed us to do so.

Q. The broker, the man from whom you bought, therefore would be present at the clearing-house if he was a member of the board?

A. Yes, sir.

Q. Do you pretend to tell the jury and this court that after this broker had accepted a profit or paid a loss on that deal he could come back on you and demand a delivery of that May wheat in a case where there had been such a trade as that?

A. Not when our trade is not offset by another, he could not.

Q. If you sold wheat and the other party accepted it, do you mean to say he could come back and demand a delivery of that wheat?

145½ A. The rules prescribe the manner of doing business and the manner in which one trade can be offset by another. Unless trades are offset, every transaction on the board of trade is supposed to be made with the intention of receiving or delivering the article sold. It is done in a good many instances. You could not receive and deliver all the transactions on the board of trade. You could not find men enough.

Mr. MOORE: They spoke of the rules of the board of trade. I understand that they go in on the theory that they connect Hansen with them.

The COURT: Yes, of course.

Q. Now suppose we take the same old case. Suppose we take

that May wheat, bought in November for May delivery, and it comes down to May, 1889, is there anything in those rules of the board of trade which prevents your settling with your seller or buyer as you both want to?

A. I have already told you that you can't settle differences. The wheat must be bought or sold in open market.

Q. I suppose your man could settle that way if you wanted to settle; when both wanted to do it?

A. It can't be done that way. Under the rules of the board of trade, we cannot do it. It was never done. It was never done by our house.

Q. Supposing you did do it?

A. We never did do it.

Q. Supposing you did do it, what is the board of trade going to do about it?

A. If they knew it they would suspend us from the board.

Q. That is all there would be to it?

A. Yes, sir. I do not know what there would be to it. I do not know anything about such a transaction. I can say there never was a transaction made by our house but it was a sale or purchase, as we were ordered.

Q. How do you know?

A. The proof is on these cards.

Q. How do you know?

146 A. I do not know from my own personal knowledge. I gave instructions to that effect.

Q. Then why do you say so, under oath, before this court?

A. Because it is the truth.

Q. How do you know it is the truth?

A. I know it by observations.

Q. All you know about it is what you have told other people to do, isn't it?

A. Yes, sir.

Q. How do you know Hansen's contract was made in Minneapolis when you were in Chicago or Omaha?

A. I don't know.

Q. Then why do you swear to this jury that you do know?

A. I am not talking about Mr. Hansen's contract; Mr. Hanson's contract was made with him in Minneapolis with Mr. Handy.

Q. Just so; so you do not know anything about Hansen's contract?

A. I do not know what Mr. Handy told Mr. Hansen.

Q. You said you never had bought a bushel of wheat in your life?

A. I mean I never went into the wheat pit and said I will buy or I will sell.

Q. Why, then, do you say you know?

A. Well, I believe.

Q. That is more like it; but why did you say you knew it?

Objected to.

Q. You took occasion to inform the jury that you had paid a very large sum of money to settle up these deals, and that you had made a heavy loss. Do you know whether or not your house has actually paid anything to any one on account of these transactions of Hansen?

A. I only know from the books. I believe every dollar was paid, and I furnished the money.

Q. I understand you are a commission merchant?

A. No, sir.

Q. What do you do?

A. I am not in business at present. I was in the pork-packing business there for 18 years.

Q. You were also connected with this house in Chicago?

147 A. I was while I was in business.

Q. As head of the house?

A. I believe they called me that.

Q. You were running both branches?

A. Yes, sir.

Q. Look over these reports in February. The reports show you were carrying contracts for 40,000 bushels of May wheat and 25,000 bushels of July wheat for Mr. Hansen.

A. We had purchased from various commissionmen that amount of wheat for May delivery.

Q. That is what I say; you had 40,000 bushels of May wheat and 25,000 bushels of July wheat that you were carrying for Mr. Hansen.

A. Well, we don't call it carrying.

Q. You had a contract?

A. We had a contract.

Q. You had a contract for future delivery in May, bought from different brokers at different times previously, 40,000 bushels of May wheat?

A. Yes, sir.

Q. Assuming that to be correct, as it is correct according to your reports—that, as I have just stated, you had 40,000 bushels of May wheat and 25,000 bushels of July wheat that was bought in July and ran along down——

Mr. KIRTON: No; it was in April.

Q. What wheat were you carrying in February?

A. I don't know anything about it except from the books.

Q. You carried, did you, contracts which you made April 29th for June wheat? Do you remember, of your own personal knowledge, whether your sales of May wheat on April 29th went into the clearing-house?

A. I only know that all the transactions go through the clearing-house.

Q. You bought 40,000 bushels of wheat, according to your report, and you then simply changed that May wheat into June wheat?

A. No, sir; there is no change about it. We sold the May wheat and bought June wheat.

148 Q. When you bought that May wheat, what did you do; did you sell it to one broker and buy it of another?

A. I want you to understand there was no change of wheat in open market, but there was a sale of 40,000 bushels of wheat and a purchase of wheat.

Q. It was a sale of 40,000 bushels of May wheat and a purchase of 40,000 bushels of June wheat?

A. Yes, sir; that is what it was.

Q. They sold May wheat on the 29th of April, and that would close out the May contracts, wouldn't it?

A. I don't know whether it would or not.

Q. If it did, that would go through the clearing-house, wouldn't it, before the commencement of this action?

A. Yes, sir; I have no doubt about it.

Q. And your report as stated here would be substantially correct?

A. What report?

Q. This corresponds with the clearing-house statement.

A. What report do you mean?

Q. The reports sent to Hansen.

A. The statements?

Q. Yes.

A. The statements are correct; I have no doubt; I do not know of my own knowledge; I believe them to be correct.

Q. Isn't it a fact that the statements given to Hansen were the same statements that were sent to the clearing-house?

A. No, sir.

Q. I will ask you whether or not this general balance was included. In the first instance there is a particular balance. Now, when the balance—the one sent to Hansen—is ascertained does that figure in the clearing-house statement?

A. It may go in at various times; I will testify it went in before we went out of business.

Q. But you have testified already, I believe, that your April deals were in the clearing-house before this action was com-

149 menced?

A. No, sir; I testified I believed they did. I am almost certain they did, but I can't tell you postively.

Q. Then you won't state positively?

A. No, sir; I don't know the date that any of these transactions went through the clearing-house, but I will swear we sold 40,000 bushels of May wheat for Mr. Hansen on April 29; I know that for certain, but I can't say when it all went through the clearing-house; 5,000 bushels of that might have been settled the first day of May, another 5,000 might have been settled at another time some days later, perhaps 1,000 might have been settled at another time, and then another 10,000, and the other 10,000 still later, until it was all delivered, but not all at the same time. There is a certain stated price posted up by the secretary of the board of trade on each day as a basis of this settlement. That is the price of wheat at an even half cent, the nearer to the market at a certain hour of the day

But that has nothing to do with customers for whom the commissionman does business. That is for the commissionmen themselves. The original contract on the books until it is closed out by his order determines the price between the commissionman and the customer.

Q. Have you not testified to the best of your knowledge that before this action was brought that all the deals that were closed out in April had gone through the clearing-house?

A. I believe that is so.

Q. That would include this deal of April 29th?

A. I believe so.

Q. And that the statements that were made out to Hansen contained substantially the same subject-matter that went to the clearing-house in the aggregate?

A. Yes, sir; in the aggregate.

Q. But this sale of wheat on the 29th of April might not have gone through the clearing-house for several days; it might never have gone through the clearing-house?

A. It might have been delivered to us, because, although Mr. Hansen's order was to sell on the 29th of April that don't
150 relieve us from our responsibilities to the brokers of whom we purchased this wheat; we might receive it the next day.

Q. Would you receive it the first day of May?

A. We would have to receive it if it was delivered to us.

Q. Did you receive any wheat on this Hansen deal?

A. I can't tell you as to that; I don't know.

Q. Suppose that this Hansen deal went to the clearing-house in connection with others, with a statement of it substantially that you furnished to Hansen, showing a gain or a loss, there was an immense loss, and the clearing-house cleared that loss, wasn't that the consent of the broker to settle his difference that way?

A. We paid the loss if it was settled.

Q. Wasn't that the consent of the other party to receive it in that way?

A. If the trade was offset we paid it through the clearing-house. Whenever it was offset it was paid. When this sale was made, April 29th, it was reported at the clearing-house along with other trades, in connection with other trades of all the other brokers—they all go through the clearing-house, as I said before—and as soon as the trade could be offset by another trade it went through the clearing-house.

Q. It might not have been offset?

A. The wheat might have been delivered to us in May; we might have received that particular wheat.

Redirect examination by Mr. KIRTON:

Q. In respect to this transaction being closed up as between you and Mr. Hansen, they are closed up at the time that those statements are rendered?

A. Yes, sir.

Q. And if there is any balance due Mr. Hansen from your house he can come there at that time and get it?

A. Yes, sir; he can have his check in twenty minutes.

Q. But between you and these brokers with whom these transactions were made they continue open after settlement with Mr. Hansen and you assume the liability of the failure of any
151 broker he might have sold to?

A. Yes, sir.

Q. Mr. Hansen runs none of that risk?

A. None whatever.

Q. You leave out all that?

A. Yes, sir; we assume the liability between the commission merchant when they call for margins.

Q. What obligation did you assume as to the payment of that money through the clearing-house?

A. I have had thousands of dollars put up on Mr. Hansen's deals to the brokers for which I purchased the wheat for the faithful performance of my contract. I don't receive that money until that trade was settled, and then only by endorsement on a check.

Mr. MOORE: And they were settled that way when you paid them?

A. Whenever the trade was settled through the commissionmen I received back my margins; that was what we call a margin sale.

Q. So when you say some trades might not have been settled until after this action was begun you mean that money you had assumed the obligation of to the broker?

A. Yes, sir.

Q. You mean it had not been settled at that time?

A. I mean it had not been offset. We sold on the 29th, and the transaction went to the clearing-house, but it might not have been settled through the clearing-house until after this suit was commenced.

Q. But between you and Hansen it was settled?

A. Yes, sir.

Q. Whatever liability you assumed to perform that contract, he had nothing to do with it?

A. No, sir.

Q. You put the money up for that?

A. Yes, sir. I have no doubt we had more money up for the performance of that contract than there was lost as margin.

Q. The first obligation between you and the commissionmen for Hansen was your obligation to pay that money at any time?

A. Certainly; I was obliged to pay the money.

Q. That obligation was fixed at the time that the matter was settled between you and Hansen?

A. Yes, sir.

Q. According to the rules of the board of trade?

A. Yes, sir. I had this money up as security for our con-
152 tracts with these various commission merchants.

Q. In pursuance of that you did afterwards pay that money?

A. Yes, sir; I did.

Objected to as leading.

Q. In pursuance of that did you or did you not pay the money?

A. Do you want me to swear positively I paid the money?

Q. No, sir; I just want to know if you did pay the money in connection with your business?

A. Every dollar of money that we were liable for to the commission merchants, to the best of my knowledge and belief, was paid to all commission merchants. I paid the money in and I presume it was paid out.

Q. That included this money for Mr. Hansen?

A. Yes, sir.

Mr. MOORE: What do you claim as to that position?

Mr. KIRTON: That at the present time we have actually paid every dollar, and at the time the action was commenced we had paid every dollar, except possibly the last transactions, and as to them they were paid subsequently.

Mr. MOORE: What was the amount of that to which you now refer? Is that that June deal and sale of June 8th?

Mr. KIRTON: The answer admits what this witness has testified to. Mr. Boyd testified that all these amounts have been paid, though they might not all have gone through the clearing-house when this action was commenced.

The COURT: The obligation was fixed at that time to pay that amount?

Mr. KIRTON: Yes, sir.

The COURT: And that since has been paid?

Mr. KIRTON: Yes, sir; that is what he testified to.

Mr. MOORE: Do you know what contracts they were carrying in February for Hansen? My idea is it was 40,000 for May and 25,000 — July.

Mr. KIRTON: That is correct.

Q. Then in February you had 40,000 May and 25,000 July, and you carried these contracts down to the 29th day of April,
153 and on the 29th of April you telegraphed Hansen what you should do with his May wheat; that that was the last day. Did you ever receive any answer from Hansen—any telegram from him?

A. I can't tell you; I might not have been in the office at that time.

Q. Do you remember the transaction?

A. No, sir; I don't know particularly about that transaction.

Q. Did you have anything to do with it?

A. I don't remember; I might and I might not.

Q. Did you particularly have anything to do with the sale on the 29th of April of this 40,000 bushels of May wheat?

A. I don't remember whether I did or not.

Q. Did you have anything to do on the 29th of April with buying 40,000 bushels of June wheat?

A. I can't tell you whether I had anything to do with it or not.

Q. Do you remember the deal on your books?

A. I only remember it in a general way as either seeing it on the books or being told by my manager or my book-keeper.

Q. Did you give any directions to any of your men in your employ to change that May wheat into June?

A. I can't say as to that; I can't say who gave directions.

Q. Do you remember any further directions you got from Hansen to do that same thing?

A. No, sir; not particularly, I don't.

G. M. BRUSH was sworn as a witness for plaintiffs and testifies as follows:

Q. Where do you reside?

A. Minneapolis.

Q. Are you acquainted with Mr. Hansen, the defendant in this action?

A. Yes, sir; I have known him since about the 25th of February or the first of March, 1889.

Q. Were you in the employ of Boyd Brothers in the spring of 1889?

A. Yes, sir. I succeeded Mr. Handy there, in Minneapolis,
154 in the same business, and continued up to and until the close of their business at the same place.

Q. Will you look at these letters and state in whose handwriting they are and whose signature?

A. Mr. Hansen's.

Q. Received by you?

A. Yes, sir.

Q. In connection with this business?

A. Yes, sir.

Plaintiffs' counsel offers in evidence four letters from defendant to witness, and the same are marked Plaintiffs' Exhibits "L 1" to "L 4," inclusive; received without objection and read to the jury. Exhibit "L 1" is as follows:

"BENSON, MINN., *Apr. 8th*, 1889.

J. N. Brush, Esq., Minneapolis, Minn.

DEAR SIR: I have received your message, but, as to more margins, I cannot do anything at present, more than I have done, as I told you before.

Yours truly, THEO. HANSEN."

Q. Did you have any conversation with him about margins?

A. Yes, sir.

Q. When?

A. Well, you might say continuously, right along from the fore part of March up to June.

Q. How late in June?

A. Well, I guess nearly up to the first of July. I cannot give you dates exactly. I was continually after him for margins.

Q. You know of the last transactions that were had between Mr. Hansen and Boyd Brothers?

A. Yes, sir; it was his wheat; it was transferred to June.

Q. Was he informed of that?

A. Yes, sir.

Q. Is a report of that change from May to June included in this statement?

A. Yes, sir; I rendered a statement.

Q. Is that the statement of the selling of the May wheat
155 and the buying of the June? (Showing a paper to witness.)

A. Yes, sir.

Q. Was that sent to Mr. Hansen?

A. Yes, sir.

Q. Where from?

A. From my office.

Q. At the time it bears date?

A. Yes, sir; or immediately thereafter, within 24 hours.

Said paper is offered in evidence and marked Plaintiffs' Exhibit "M;" received in evidence without objection and read to the jury. Exhibit "M" is as follows:

"*Memorandum.*

MINNEAPOLIS, 4, 29, 1889.

Chas. E. Handy, manager, Minneapolis:

Made trades this day by Jas. E. Boyd & Bro., 8 board of trade, Chicago, for the account and risk of Theo. Hansen.

Purchases: 40 M bu. June W. at 82¼.

Sales: 40 M bu. May W. at 81½."

Q. With regard to the fact of the final closing out of Mr. Hansen's trade?

A. Which, in May or June?

Q. In June.

A. Well, I told him his June wheat would be closed out at the end of the month. At the time when his wheat was transferred from May to June, when his May wheat was sold and the June wheat bought, at that time I was endeavoring to get him to close the deal, to put up his margins and close the deal, which he neglected to do. He told me that if he was given time he would pay every cent of the indebtedness to Boyd Brothers. He told me that at different times on the chamber of commerce floor, in Minneapolis.

Q. Did he say anything to you concerning the fact of his having told Kirkbride to pay in the produce of the wheat shipped by Hansen to Kirkbride?

A. Yes, sir.

Q. What about that Kirkbride matter?

A. Mr. Kirkbride paid me—at least, Mr. Hansen went to
156 Kirkbride's office and got a check and delivered it to me.

Q. Was that delivered to you?

A. Yes, sir; that was when I was after him for margins.

Q. Was that after this loss had accrued upon the then open deals?
A. Yes, sir.
Q. And after that the deals were finally closed on the 8th of June?
A. Yes, sir.
Q. Did you have any conversation with Mr. Hansen concerning the payment?
A. After the deals were all closed.
Q. What did he say about that?
A. He said he hadn't any money and he couldn't pay, anything then.
Q. Was there anything said at that time when he would pay, if at all?
A. I cannot remember, after the deals were closed, whether he said he would pay it or not if he was given time. I think that conversation was previous to the time that the deals were closed.
Q. What was stated in this conversation?
A. He said that he would settle this wheat matter if he was given time.
Q. Anything said about the amount?
A. No; he said if he was given time he would pay all that he owed Boyd Brothers. I sat down and wrote Mr. Boyd to that effect, about the conversation I had with Mr. Hansen.

Plaintiffs' witness, GEORGE M. BRUSH, on cross-examination testified as follows:

Q. As I understand you, you neither bought or sold any wheat under Hansen's orders, personally?
A. No, sir.
Q. Your connection with the business was to close out and recover, if you could, the margins and close out the deal?
A. Yes, sir.
Q. And all your efforts were directed to that object?
A. Yes, sir.
157 Q. You knew of this transfer of wheat from May to June, didn't you?
A. Yes, sir.
Q. And there was then 25,000 bushels of wheat on July option?
A. I cannot remember that without the books.
Q. Did you ever have any conversation with himself or any order or instruction from Mr. Hansen in respect to transferring that wheat?
A. Yes, sir; I had a conversation with him.
Q. When was that conversation?
A. Previous to the first of May; I cannot give you the date.
Q. Here is a telegram that purports to come from your house; do you recognize it?
A. I should say it was; of course I cannot tell.

It is admitted that James E. Boyd & Bro. sent said telegram. The same is offered and received in evidence without objection as a

part of the cross-examination of this witness and marked Defendant's Exhibit "3" and read to the jury.

Said "Exhibit 3" is as follows:

"MINNEAPOLIS, 4, 29, 1889.

Theo. Hansen, Benson:

Shall we change your May wheat over to June? Today is your last chance. Ans.

J. E. BOYD & BRO."

Q. Now, with reference to that telegram (referring to Exhibit "3") or the date of it, can you now fix with more certainty the date of your conversation with Mr. Hansen in respect to the change of that wheat from May to June?

A. The latter part of April, undoubtedly. I can't give you any exact data.

Q. What was the conversation?

A. In regard to changing it over, do you mean?

Q. Yes.

A. I was endeavoring to get margins. He said he didn't have any money to put up then. I asked him if he didn't want to transfer the May wheat to June, and he said he didn't know. He didn't seem to give me any satisfactory answer; he didn't say either yes or no.

158 Q. You spoke to him about it and that was the result of it?

A. Yes, sir.

Q. Do you know of any authority to Boyd Bros. from Mr. Hansen in any way to change that wheat from May to June?

A. I don't know as I do.

Q. You know it was done?

A. Yes, sir.

Q. As I understand your testimony, you came into the office about the first of March?

A. The 25th of February, I think it would be, or the 1st of March.

Q. Mr. Murphy had been in between Handy's retirement and your coming in?

A. He was there in charge of the business, I believe.

Q. Do you know when you first called on Hansen for margins?

A. No, I don't; I presume I can refresh my memory by looking at the letter book.

Q. I would like to have you fix the date as near as you can.

A. I might have done it verbally when he was in Minneapolis; he was in Minneapolis frequently. I might have called on him verbally for margins—and perhaps I did—before I wrote him.

Q. Do you think you called on him as early as the first of March?

A. No, sir; I don't think I did quite as early as that.

Q. Certainly early in March?

A. I think so; yes, sir.

Q. Here is one as early as March.
A. That is March.
Q. This letter—this is your postscript?
A. Yes, sir.
Q. That is a letter from the house to you?
A. That is my clerk's signature, the same as though I wrote the letter. This postscript is my writing; that wouldn't materially affect any previous dates.

Defendant's counsel offers said letter in evidence, being marked Defendant's "Exhibit No. 4."

Same is received without objection and read to the jury as follows:

"MINNEAPOLIS, MINN., 5, 4, '89.

Theo. Hansen, Esq., Benson, Minn.

159 DEAR SIR: I have a letter from Mr. James E. Boyd in which he says he desires an immediate settlement of your account and gives me strict orders to attend to it at once; therefore I would like to have you meet in my office in Minneapolis as soon as you possibly can. Hoping to see you very soon, I remain,

Very truly yours, G. M. BRUSH, *M'g'r.*

Mr. Hansen, do not neglect this, please, because they are after me red hot.

G. M. B."

Defendant now offers in evidence another letter from witness to the defendant, being dated March 19th, 1889. The writing of same being admitted, said letter is read from an impression book and is as follows:

"MINNEAPOLIS, MINN., *March 19th*, 1889.

Theo. Hansen, Esq.

DEAR SIR: As the market now stands 95½ for May, your trades have gone against you, as that your account now stands figures $5,000 against you, and the house in Chicago telegraphed me to see you and request you to send me $5,000 or ship more wheat, or else send me warehouse receipts for 10,000 bushels of wheat, which I wish you would do at once and oblige. Please let me hear from you.

Yours truly, G. M. BRUSH."

Said letter above set out is marked Defendant's "Exhibit No. 5" and received without objection and read to the jury.

Q. That letter of March 19th from the copy book, does that help you now; is that your first call on him?
A. I couldn't tell you that.
Q. You don't remember?
A. I couldn't tell whether that was the first call on him or not; there might have been two or three weeks before this that I
160 spoke to him about it; he was in the office frequently; I might have spoken to him a half dozen times previously.

Q. Is it very probable you spoke to him before that?

A. Yes, sir.

Q. When you made that application to him didn't he tell you positively and clearly that he couldn't margin up any more?

A. No, sir; not then; it was later on when he told me that; he said he hadn't any money then.

Q. Did he say that at this early date?

A. Yes, sir; it seems he had wheat shipped to Kirkbride, and Kirkbride had shipped the wheat to Milwaukee, and they were waiting for the weights before they would advance him any money. He went to Kirkbride after that and got his check and delivered it to me to part pay the demands I made upon him.

Q. About what time was that check?

A. I couldn't tell you; I don't remember.

Q. Was it subsequent to that letter of March 19?

A. It was after that, I think.

Q. When did Mr. Hansen, according to your best recollection, first tell you that he would not margin up any more?

A. I don't remember that; I can't tell you exactly; it was pretty late in the deal when he said he couldn't do any more.

Q. This margin had been standing against Mr. Hansen, according to your book- and according to your personal knowledge, how long—how long had his account been behind?

A. I couldn't tell you without referring to the books; it is not fresh in my memory.

Q. Are you a broker?

A. Yes, sir.

Q. Have you been on the board of trade in Chicago?

A. No, sir; I have never done any trading there; I have been there a good many times.

Q. Where have you done trading?

A. Minneapolis, on the chamber of commerce floor, as a broker.

Q. I will ask you this question as a broker: Where the par-
161 ties are behind—say, where a party's accounts are behind and he has opened deals upon which he has made losses on a falling market, with the market against him, and you make a demand for margins and he refuses to margin up, what would you do?

Objected to as not proper cross-examination. Overruled

Q. Do you know what the usages of the market in Chicago are?

A. In regard to margins, it is a custom somewhat to extend a small line of credit to responsible parties—that is, it is a poor custom, but it is extended to a certain extent to responsible parties when it is not convenient sometimes for the parties to put up their margins; but this, I think, was an entirely different case; this case was different; he was trying to put up margins and he had wheat in transit for which he had given Boyd & Co. orders on the parties to whom he shipped the wheat for the proceeds to apply on his indebtedness in this deal; that is as I understand it; and it was through the leniency of Mr. Boyd that he was allowed to go on,

because Mr. Hansen told me he would pay every cent if he lived; and Mr. Hansen made a statement to me of his assets, which was a very favorable showing, and I considered him responsible, and I notified Mr. Boyd that I thought he was a responsible party.

Q. Still you didn't say what was the custom of brokers where a man is behind with his margins and he refuses to margin up any more?

A. I think I answered that question.

Q. You did say that sometimes there existed a bad custom of giving them a small line of credit?

A. Yes, sir.

Q. But what is the general and usual rule among brokers when the market goes against a man?

A. If Pat. Kelly had 10,000 bushels of wheat and the market ran against him $500, I shouldn't ask him for it if he wanted to let it run.

Q. Well, supposing I had that amount of $500 behind?

A. I should want to know you better before I would trust it.

162 Q. In other words, where you don't know a man's responsibility or character or his financial condition and he has a balance against him, you would sell him right straight out?

A. I would if I thought he was not a responsible party; Mr. Hansen made a property statement to me.

Objected to.

Q. Wait a moment; you say that is the custom and practice?

A. I said to a certain extent.

Q. That is, where the party's responsibility is not ascertained and where you don't care to extend an accom-odation on your own risk you close him out; is that so?

A. That is frequently so; yes, sir.

Objected to as not cross-examination.

Q. Coming back to this matter of Hansen's, isn't it true that those warehouse receipts were put up in January?

A. I couldn't say.

Q. It also appears that there had been cash payments to Boyd Brothers out of this wheat, out of these warehouse receipts, to the amount of $3,000?

A. I don't remember the amount.

Q. You say he had wheat in transit to make his margins good. How am I to understand it was as to the actual remaining residue of that wheat?

A. He claimed he had been shipping some wheat, some few cars, to Mr. Kirkbride, and Mr. Kirkbride sold the wheat in Minneapolis, and some of the wheat he forwarded to Milwaukee, and they were waiting for the return of the weights of the cars to Minneapolis to ascertain how much wheat there was in the cars, which is a common daily occurrence, and Mr. Kirkbride wouldn't pay any money until they got those weights; he wouldn't take the weights until he got them from Milwaukee.

Mr. MOORE: These wheat receipts were all dated in January?
Mr. KIRTON: Yes, sir.

Q. You spoke about wheat being in transit; did you so understand it at the time you commenced talking with him?

163 A. Yes, sir; I believed so. I understood this wheat was in transit; it was wheat that was covered in that warehouse by these wheat receipts. It virtually was Mr. Boyd's wheat—wheat that Mr. Hansen gave receipts for in his houses.

Q. These receipts, I understand, were put up as collateral, the proceeds to go to Boyd, and Hansen to make the sales on account of Boyd?

A. That I don't know. I don't know what the contract was.

Mr. MOORE: I will now make the witness my own for the purpose of asking him a question which I think is proper on the defense.

The witness is examined on the part of the defendant as follows:

Q. State whether or not, margins being against a man and the market against him, whether the broker has a power and a perfect right, and whether or not it was not his duty to sell out and save further loss.

A. It is frequently done, but there is this: Parties having business with a commission-house, the commission-house frequently carries them—that is, they allow the deals to run against them; for instance, if you were long, say 10,000 bushels, and the market went against you $300—say you were not here, but lived forty or fifty miles away, and that deal goes against you $300 or $400—I would not close you out. I would notify you and say the deal has gone against you and I would like to have you put up a little money.

Q. That is not an answer to my question.

A. I am trying to answer it in this way. Of course, if a buyer would come to me that hadn't any money and put up a two-cent margin on 10,000 bushels of wheat, and ordered me to buy when the market had gone against him to that amount, I should close it out; but when a man is trading with me and is responsible, I would feel that courtesy demanded that I should advise him if it did go a little against him, and find out what he wanted to

164 do, and to give me some instructions. I do that every day.

Q. That is all because the man is responsible; but take this very case, where the loss is running up into the thousands right straight ahead, what should you do?

Objected to on the ground that it is cross-examination of his own witness.

Q. Now, where there are not any facts of that kind, what would be the duty of the broker? You know what the facts of this case are; take the facts of this case as you know them to be at the time you came on, after that margin had gone up 9 or 10 or 15 or 18 cents, and the man said he was not able to pay, what was the duty of the broker when the market was going against him in that way?

A. I considered it my duty to go to Mr. Hansen and try to get some margins, which I did. I considered it my duty to go to Mr. Hansen and try and procure margins on those deals, which I did to a certain extent.

Q. I asked what your duty as a broker was under the circumstances of this case. You wouldn't have got them if he couldn't give them to you. You needn't answer the question if you don't want to. I asked you a simple question.

A. I don't know how to answer.

Q. Consider yourself a broker.

A. After I got that property statement from him I should have done just as I did.

Q. (Telegram shown witness.) Did you ever see that?

A. I never saw that before. I don't know anything about it.

Mr. KIRTON: That is our dispatch. As a matter of fact, after this telegram was sent to Mr. Hansen, saying that we wouldn't hold the wheat any longer unless margins were put up, the wheat was afterwards sold out at a better price than it would have been sold at before, so there was no holding onto wheat and making a loss by so doing after they said they would not hold it unless margins were put up.

165 Telegram is offered in evidence by defendant's counsel and marked Defendant's "Exhibit No. 6," and received without objection and read to the jury, as follows:

"CHICAGO, ILL.

To Theodore Hansen, Benson:

You are long 25,000 July and 40,000 June wheat. We will hold no longer unless you put up additional margins. Ans. immediately.

JAMES E. BOYD & BRO."

Q. Now, about that June sale, you were there at the time of the June sale that was made June 8th?

A. Yes, sir; I was there June 8th.

Q. On whose order was that sale made?

A. I don't know.

Q. At that June sale the whole deal was closed and sold out, was it not?

A. I couldn't tell you the day; I presume that was the date.

Q. Including the 40,000 bushels of June wheat which Hansen repudiates and the 25,000 bushels of July wheat?

A. I don't know.

Q. You don't know anything about that, do you?

A. No, sir.

The witness on his redirect examination testifies as follows:

Q. With reference to the closing out a deal, isn't this the rule with the board of trade in Chicago and with you: that where the party is responsible and requests the broker to carry him, that credit is frequently given to such customers?

A. Yes, sir.

Q. And when that credit has run to a certain limit, as far as the broker deems prudent, he will then require the customer to put up a margin or else he will close him out?

A. Yes, sir.

Q. Isn't it a fact that a broker has no right to close a customer out until he has called on him for margins and given him time to produce it?

A. Yes, sir.

Q. With regard to this cash wheat that was shipped in to
166 Kirkbride, there was about 9,000 bushels?

A. I believe there was; I believe the warehouse receipts called for about that amount of bushels to be shipped in.

Q. There was only part of that wheat shipped in?

A. Yes, sir; that is all.

Q. Did you have any conversation with Mr. Hansen about his having told Mr. Kirkbride not to pay over any more proceeds?

A. He told me he had done so.

Q. Not to pay over any more?

A. Yes, sir.

Q. Did you have any conversation with regard to the last part of the sales of that wheat?

A. I can't remember.

Q. This statement, when this wheat was changed from May to June, a statement of that fact was immediately delivered or sent to Mr. Hansen?

A. Yes, sir.

L. E. MURPHY, sworn on the part of the plaintiff, testifies as follows:

Examination-in-chief by Mr. KIRTON:

Q. Where do you reside?

A. In the city of Chicago.

Q. Do you know Hansen, the defendant in this action?

A. Yes, sir.

Q. How long have you known him?

A. I think the first time I met Hansen was the first of March, 1889, or about the first of March—no; the first of February.

Q. Were you in the employ of Boyd Bros. at that time?

A. Yes, sir; I was.

Q. Where did you meet Mr. Hansen?

A. In Minneapolis, in their office.

Q. In Boyd Bros.' office?

A. Yes, sir.

Q. Do you remember the occasion of meeting Mr. Hansen in the office in Minneapolis in June, 1889?

A. Yes, sir.

Q. Will you look at that paper (attention of witness called to "Exhibit 1–19") and state whether you had that in your possession at that time?

A. I don't know anything with regard to this particular

167 memorandum. I had two accounts from Chicago to Minneapolis in June; I think about the 10th of June.

Q. What accounts?

A. Accounts against Mr. Hansen.

Q. What is that that you have?

A. That looks like the same one at the present time.

Q. As far as your remembrance and recollection goes now about that transaction, to the best of your knowledge and belief, is that the same paper?

A. It looks like the same one.

Q. Did you deliver that account to Mr. Hansen?

A. I delivered to Mr. Hansen right there in Mr. Boyd's office, room number one, chamber of commerce, Minneapolis.

Q. What, if anything, did Mr. Hansen say with regard to the payment of that account?

A. I handed him the paper and he said he had no money on hand; he said it was a little larger than he expected and he would have to have a little time, or something; I have forgotten the exact words.

Q. Was that all?

A. That is, as far as I remember now. I handed him the paper and asked him about money. He looked at it and put it in his pocket and walked away.

Cross-examination by Mr. MOORE:

Q. Do you know when this suit was commenced?

A. No, sir; I do not.

Q. Do you know whether it had been commenced when you exhibited that paper to Mr. Hansen?

A. It was commenced about that time, I think.

Q. About that time?

A. I think I went there to Minneapolis about the 10th of June, and suit, I think, was commenced about that time; somewhere between the 10th and the 15th.

Q. Are you sure of your dates? Can you fix the dates certainly when you were there?

A. I think I arrived in Minneapolis about the 10th of June, 1889, and suit was commenced about that time; somewhere between the 10th and the 15th; suit was commenced about that time. It might have been two or three days—I think the next day—after I arrived there. I think it was on the 11th.

168 Q. You say you came on the 10th and you exhibited that account to Hansen on the 10th or 11th, and on the next day suit was commenced?

A. Yes, sir.

Q. The exact day when you exhibited to him that account was, you feel certain, the 10th?

A. I think it was the same day I arrived there. I arrived there about 8 o'clock in the morning or half past.

Q. Where did you meet Mr. Hansen at the time that you exhibited that account to him?

A. In our office there.

Q. Did Mr. Hansen say anything to you about that June deal?

A. He didn't say anything to me at all about that deal.

Q. About the transfer from May to June?

A. No, sir; I didn't know anything about it.

Q. Did he not hand that bill (Exhibit 1–19) back to you without any remark about it?

A. No, sir; he never handed any account back to me. I was there in February also, and I handed this account to him in June.

Q. Do you remember distinctly that it was in Boyd's office?

A. In Boyd's office; yes, sir.

Q. Do you remember distinctly what was said and what was done?

A. I think I handed him the account and asked him about the money, and he said it was a large amount and he couldn't pay it at present. That is all there was about it. I stood there talking a minute or two about the markets, &c., and he got up and went out. I think I met him on the board of trade a half hour or an hour afterwards.

Q. Did you have any further talk about that account then?

A. No, sir; I handed him the account and he put that in his pocket down-stairs. He opened it and looked at it—just glanced at it—and then put it in his pocket down-stairs, at that time in the office.

Q. It was just one account?

A. The same account; yes, sir.

Mr. KIRTON: Do you know anything about Mr. Hansen's giving any instruction to Mr. Kirkbride not to pay over any money
169 or proceeds of that wheat?

A. No, sir; I don't know anything about that.

H. E. MURPHY, sworn on the part of the plaintiff-, on cross-examination by the defendant testified as follows:

Q. (Defendant's Exhibit "No. 2" shown witness.) Did you make out that account?

A. No, sir; I didn't make it out.

Q. Do you know whether that corresponds with the books?

A. Yes, sir.

Q. The account is correct, according to your books, as far as it goes?

A. As far as my knowledge of it goes.

Q. Will you say how much actual money he drew out?

A. I couldn't tell you that, because I didn't pay him anything.

Q. What do these entries on this side of the account mean? What is the amount of cash that appears to have been drawn out by him?

A. He appears to be debited by cash about $3,875.

Q. And then there are drafts?

A. $9,762.50.

Q. How much does that make altogether?
A. About $13,000.

On the trial of said action the plaintiffs introduced in evidence and read to the jury the deposition of E. J. NOBLE, a witness on behalf of the plaintiffs, who, being duly sworn, testified as follows:

My name is Edwin J. Noble; I reside in Chicago; my occupation is board of trade commission business.

Q. Did you execute any order on account of the defendant in this suit?
A. Yes, sir.
Q. Have you anything showing the orders that were so executed?
A. Nothing but the trading cards of the firm.
Q. You have the trading cards of the firm?
A. That is all; yes, sir.

(Witness shown trading cards, marked Exhibits A to S-17, as containing orders in witness' handwriting executed on the Chicago board of trade for the defendant Hansen by order of Boyd Bros. and as their agent.)

The witness on cross-examination testified as follows:

Q. When you were on the floor and made these several
170 sales and purchases which you have testified to, was there any understanding between you and the persons to whom you sold or the persons from whom you bought on Hansen's account that any wheat should be delivered to them in case of a sale, and *vice versa*, any wheat delivered by them to you for Hansen in case of a purchase?

A. There was nothing specified on any specific contract or trade. We were trading under the rules of the board of trade, which contemplate the receiving and delivering of the grain, but on any specific trade we don't make any specific statement or stipulation pertaining to it, but we are governed by the rules of the board, which contemplate the receiving and delivering of grain. There is no stipulation or statement made at the time the trade is made with the party.

Q. You made no contract that there would be an actual delivery to you or by you?
A. That is understood in all those trades.
Q. Then, if I understand you, when you sold wheat on account of Hansen to any person operating through a commission firm you gave them the privilege of demanding that wheat from you?
A. No, sir.
Q. From Hansen, then?
A. No, sir.
Q. At any time during the entire month?
A. No, sir; not at all. When we sell wheat to a party for account of Hansen or any customer you may name it was with the understanding, under the rules of the board, that those parties to whom

we sell must receive the cash wheat from us on any day in that month that we see fit to give it to them. No; we have no privilege in it other than they have a contract to take it.

Q. You have a contract, then, and your contract gives you the option of delivering that wheat at any time during that month at that price, doesn't it?

A. Yes, sir.

171 Q. If you sell on account of Hansen 5,000 bushels September wheat at 104, you then have the privilege of delivering that wheat at any time during September at 104, hav'n't you?

A. Well, you can't call it a privilege.

Q. Well, you have a contract?

A. It is an obligation; that is what it is.

Q. Then it is a contract, as I understand you, for an option, the option being the privilege of the seller to deliver at any time within a given month, is it not?

A. It is a privilege of the seller to deliver at any time during the month for which the wheat is sold.

Q. With the option to choose his day of delivery?

A. Yes, sir; he can choose his day during the month.

Q. Now, when Mr. Hansen purchased, or, as you say, you purchased for him, we will say July wheat at 100, the situation was simply reversed, as I understand it, and some one else had the privilege of delivering to him on any day during July a certain amount of wheat at a stipulated price?

A. Yes, sir.

Q. And the duty was incumbent upon that person to deliver it some time during the month?

A. Yes, sir; and the obligation upon us to receive it at their pleasure and pay for it.

Q. While you were with James E. Boyd & Co. in the capacity of purchaser on the floor, did you ever know of your own knowledge of an actual delivery of wheat on account of any customer?

A. No, sir; I don't know that I ever did. Well, I might say that I am unable to state; that I don't know any of the detail-, although I know of large deliveries and receipts of cash grain and provisions every month.

Q. Of your own knowledge?

A. Excepting as I would see the boys in the delivery-room receiving it and seeing the receipts, but as to the customer it belonged to and what disposition was made of it, I wouldn't know. A. Yes; I know of my own knowledge that there was actual receipts

172 and delivery of cash grain and provisions. I have seen the receipts in the office. I have seen as high as a million bushels of cash wheat right in the office; but as to what customer it was I couldn't say.

Q. But you don't know absolutely that those receipts showed actual delivery, do you?

A. Yes, sir.

Q. Of your own knowledge?

A. Yes, sir; I have seen a great many elevator receipts there of

elevators brought in as high as from $200,000 to $250,000; paid out in cash for these elevator receipts, the actual cash grain. Now, who that grain was for—what customers—I can't say. *A.* Yes; it was their habit and practice to receive and deliver grain every month, and provisions, too. *A.* It was their (the plaintiffs') practice and habit to receive and deliver quantities of cash grain every month, but as to their respective customers or the details of the business I am unable to testify. *A.* You see my transactions were in the wheat pit solely, and where they receive cash grain upon these purchases I never would know about it and never would hear of it unless it was merely by chance; that would be a transaction in the office. I am a broker, you might call it—a hand or machine, if you please, to execute the orders on the floor that came to me from the firm (the plaintiffs).

Q. Is it not a fact that there was no actual wheat either sold by. Hansen and delivered by him through you or purchased for him and delivered to him through you?

A. Well, now, that I can't really answer except from hearsay. Of my own knowledge I don't know anything about it. You see my transactions were in the wheat pit solely, and where they received cash grain upon these purchases I never would know about it and never would hear of it; that would be a transaction in the office, or where they delivered cash grain, as parties sometimes would ship in car-lots and deliver it on these contracts, that I never would know of unless it was merely by chance.

173 Q. You can't, then, undertake to testify as to any of these purchases or sales said to have been made on account of Hansen, that there was any actual wheat either bought or sold or contracted to be bought or sold or delivered?

A. Well, nothing more than the firm's obligation in the matter. Of course, the firm are obliged to deliver the wheat, irrespective of Hansen or any person from whom they may purchase—they are obliged to receive the cash grain.

Q. But you can't testify as to that?

A. I can't testify as to the handling of any cash grain for Mr, Hansen.

Q. What do you mean by cash grain?

A. I mean actual cash grain. I can't testify to that of my own knowledge. I have understood that Mr. Hansen——

Q. Never mind.

A. Well, I can't testify to it of my own knowledge at all.

Q. You, in other words, are simply, as it were——

A. A broker, you might call it.

Q. A hand or a machine, if you please, if the term is not odious, on the floor to execute orders that came to you from the firm?

A. Yes, sir.

Q. Whether there was any actual wheat concerned in the transaction, either sold or purchased or delivered, you don't know?

A. No, sir; I don't handle that, and therefore I don't know. I only would know by inquiring in the office. It was a matter, of course, that did not concern me.

Q. So ignorant are you of the transactions with Hansen that you are not able to testify that Hansen really owes your firm anything, are you, of your own knowledge?

A. No, sir; I know nothing about the indebtedness; don't even know the amount.

Q. You don't know that there is any indebtedness even, do you?

A. No, sir; I do not. These cards I don't think I have seen them, unless it was mere chance, since the day I made the
174 trades. After they go into the office, unless there is some disputed trade, or some mistake in the trades, or something of that sort, I never see them afterwards, or unless it comes up in a case of this kind. I haven't seen those cards since I handed them into the office, to my knowledge, until today.

The witness on redirect examination further testified:

Q. Well, now state whether or not the contract as entered on these trading cards by you—what enters into the mind of the parties in contemplation of these contracts as they are made?

A. I should suppose that it means or contemplates, as you put it, what would enter into my mind would be the fulfilling of the contract under the rules and requirements of the board of trade.

On the cross-examination of George M. Brush the defendant introduced the following:

"EXHIBIT 6."

"CHICAGO, ILL.

To Theodore Hansen, Benson:

You are long 25,000 July and 40,000 June wheat. We will hold no longer unless you put up additional margins. Ans. immediately.

JAMES E. BOYD & BRO."

On direct examination of the defendant, Theodore Hansen, sworn as a witness on behalf of himself, the defendant introduced in evidence the following:

"4, 26, '89.

Theodore Hansen, Esq., Benson, Minn.:

Please wire us your instructions as to disposal of your May wheat. We can change it into June at a difference of about ½ to ¾ of a cent. If you want to change it over you will have to do it before Thursday.

(Signed) BOYD BROTHERS,
By G. M. BRUSH."

175 On the cross-examination of the witness G. M. Brush the defendant introduced in evidence the telegram, "Exhibit 3," as follows:

"MINNEAPOLIS, 4, 29, '89.

Theo. Hansen, Benson:

Shall we change your May wheat over to June? Today is your last chance. Ans.

J. E. BOYD & BRO."

On the direct examination of E. J. Noble plaintiffs introduced in evidence "Exhibit C."

(*Telegram.*)

"4, 29, '89.

To H. C. Murphy:

Don't forget to change the Hansen business over.

BRUSH."

On the direct examination of the witness Geo. M. Brush the plaintiffs offered in evidence "Exhibit M," which is as follows:

Memorandum.

"MINNEAPOLIS, 4, 29, '89.

Chas. E. Handy, manager, Minneapolis:

Made of this day by Jas. E. Boyd & Brother, 8 Board of Trade, Chicago, for account and risk of Theodore Hansen:

Purchases.	Sales.
40 M bu. June w. at 82¼	40 M bu. May w. at 81½."

On the cross-examination of Charles E. Handy defendant offered in evidence, among the other statements, also said statement of account, "Exhibit 1–19," which was handed to the defendant by L. E. Murphy, at Minneapolis, on June 10th, '89.

The plaintiffs then rested their case, and the defendant's counsel requested and moved the court to instruct the jury to return a verdict for the defendant; which request and motion on the part of the defendant was disallowed and overruled by the court; to which ruling by the court the counsel for the defendant then duly excepted.

176 The case on the part of the defendant is then opened.

Defendant's counsel then offers to read the statute of the State of Illinois set up in the answer, to which plaintiffs' counsel objects on the ground that the same is repugnant to article one, section 10, of the Constitution of the United States, and objects to the reading of each and every section and part of said statute for the reason above given.

The court overruled the objection and plaintiff- excepted.

Counsel for the defendant then offered and read in evidence sections one hundred and thirty (130) and sections one hundred and thirty-one (131) of chapter thirty-eight (38) of the Revised Statutes of the State of Illinois of 1881, which sections are as follows:

§ 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

§ 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property or other valuable thing, won by any gaming, or playing at cards, dice, or any other game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event
177 whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet, to any person or persons so gaming, or betting, or that shall during such play or betting, so play or bet, shall be void and of no effect.

Counsel for defendant then called as a witness the defendant, THEODORE HANSEN, who, being duly sworn on his own behalf, testified as follows:

Q. What is your name?

A. Theodore Hansen.

Q. Where do you reside and what is your business?

A. Benson, Minnesota. My business, it has been general store and connected with grain—buying cash grain in the country.

Q. You are the defendant in this action?

A. I am.

Q. Have you seen these reports in evidence here and have you heard the evidence of Mr. Handy?

A. Yes, sir.

Q. You may state your first acquaintance and interview with Mr. Handy—where it occurred and when.

A. I first was introduced to him—I met him, but I seen him before, but I was not introduced to him; it was in the chamber of commerce in Minneapolis, on the board there. That was in 1888—either the last part of July or about the first of August.

Q. When and where did you have your next conversation with him?

A. The same day, after the board was closed.

Q. In the same building?

A. In the same building.

Q. On the floor of the board?

A. As we went out of the hall; he spoke to me in the hall and said he thought he knew I had had some trades a year ago, and they had roasted me pretty hard then, but he thought it was a good chance to make something back this fall by making some scalps. He used the word scalps. Well, I said, if I should decide to make any deals with you, what commissions and what margin do you require? He said one or two cents margin on a bushel, and of course we shall expect you will always keep your deals at
178 the market. Well, I said I expected to, and that was all that was said at the time, I think.

Q. When did you next see him and where, and what was said and done?

A. Shortly after—a day or two, I can't say which, but shortly after—I went into his office and said——

Q. Where is his office?

A. It was room No. one, chamber of commerce building, on the ground floor.

Q. You went into his office?

A. I went into his office and said to him, if he chose he could buy me 5,000 December wheat.

Q. What else was done about that order?

A. I sent in an order to get the deal for me.

Q. He took your order?

A. Yes, sir.

Q. At either of these interviews to which you have referred did Mr. Handy say anything about the board of trade or the rules of the board of trade?

A. No, sir.

Q. Did you say anything about them?

A. No.

Q. Did you know anything about it?

Objected to as immaterial and incompetent?

Q. Did you know anything about it?

A. No, sir; not the rules.

Q. Was there any allusion or reference made to the board of trade by either of you in either of those conversations?

A. No, sir.

Q. Was there anything said or done other than as you have testified?

A. No; not that I remember.

Q. Now, it seems you made your first order for December wheat. Now, then, subsequent to that time which you have testified to, did Mr. Handy or Boyd Bros. or Mr. Murphy or any of these parties ever say anything with reference to or make any statement whatever in respect to the rules of the board of trade to you?

A. No; never explained any such thing to me.

Q. I show you this report, marked Exhibit "1-1," under date of August 25th, 1888, and also Exhibits "1-2" and "1-3." You said in your direct testimony just now—is that order in 1-1,
179 under date of August 25th, the one to which you referred when you testified as to the first deal—is that the order for the first deal?

A. Yes, sir.

Q. Is that the way they were ordered at that time?

A. Yes, sir.

Q. You said it was December wheat; are you not mistaken as to the month?

A. There must have been a trade before this commenced.

Q. Your first trade might not be in this transaction.

A. It was December wheat.

Q. Look at 1-1 and see whether that was an order you gave Mr. Handy for the purchase of wheat.

A. That is an account; yes, sir.

Q. Did you give him the order for which this is a report of sale?

A. Yes, sir.

Q. Did you give him an order for which this is a report of purchase?

A. Yes, sir.

Q. You gave him an order for that, and that is the report of sale also?

A. Yes, sir.

Q. Did you hear Mr. Handy testify in respect to that exhibit?

A. Yes, sir.

Q. Does that report properly show the transactions between him and you?

Objected to as a conclusion.

The COURT: I think that is proper.

Plaintiffs' counsel excepts to the ruling.

A. It shows exactly what was intended.

Objected to.

The COURT: I think he can testify as to what he understood with respect to it.

Plaintiffs' counsel moves to strike out the answer of the witness. Motion denied. Plaintiffs except.

Q. Was that deal closed at the date reported to you by Mr. Handy or about that time?

A. At the time the report is given. Of course, the report is given after the deal is closed.

180 Q. It was the report of the closing of that deal, was it?

A. Yes, sir.

Q. When did you receive that report?

A. When I was there. I got it the same day, but when I was at home at Benson they sent it to me by next mail.

Q. So you received it either the same day of its date or within two or three days?

A. Yes, sir.

Q. Was that transaction closed as shown on that report?

(No answer.)

Q. That commission was charged to you?

A. Yes, sir.

Q. As shown there?

A. Yes, sir.

Q. And the settlement was made on the difference of prices on the day of the contract for purchase and——

Objected to as leading.

Q. Now, looking at that paper, was that deal closed between you on the difference between the contract price at the date of the purchase and the market price on the day on which the sale was made?

Objected to as leading.

The COURT: Ask him how it was closed.

Q. How was that deal closed?

A. By my giving him an order to sell out my wheat.

Q. How was the settlement made?

A. In the settlement the profit and loss was on the difference. The profit or loss was in the deal—the difference between the contract price of purchase and the price at the day it was closed out. It was charged up to me or credited to me, as the case might be.

Q. I understand you, then, that as to that matter—now, in point of fact, when that deal was closed, there was a loss or gain; which was it?

A. It was a gain.

Q. And a gain found by the difference between the contract price when you bought and the market price when you sold?

Objected to as leading.

181 The COURT: How was it closed? You ordered him to buy on the 10th of August 5,000 bushels of May wheat and you ordered him on the 14th of August to buy 5,000 of May wheat, and on the 24th you ordered him to sell 10,000 bushels of May wheat; is that it?

A. Yes, sir.

The COURT: Now, how was the whole matter closed?

A. The difference between the purchase and the sale price was credited to me on my account.

Q. Does that report correctly state the manner in which it was closed?

A. Yes, sir.

Q. Now, you have stated about the conversation between you and Mr. Handy, and you made use of a word that we don't understand; you said Mr. Handy said it was a good time to make a few scalps. What do you mean by the word "scalps"?

A. That word is used on exchange frequently when they mean taking a short time, buy and sell as quick as you see a profit, and when you have a loss close it out at any moment.

Q. At a loss?

A. Yes, sir; at a loss or at a profit, taking it out and closing it out when you can get a small profit.

Q. Suppose you have a gain?

A. You can take it in at any time you want to.

Q. Then a scalp means a short deal that is closed out in a short time?

A. Yes, sir.

Q. To be taken in a short time?

A. Yes, sir.

The COURT: Do you mean that you sell May wheat, and that you had previously bought May wheat, and that it was settled before May?

A. Yes, sir.

Q. That is what you mean by a scalp, then? Look at Exhibit 1–2, under date of August 30th, and state whether the wheat bought there was on an order from you to Mr. Handy.

A. Yes, sir.

Q. Whether that wheat that was sold was sold on an order from you to Mr. Handy?

A. Yes, sir.

Q. And whether that was all closed out by the sale of that wheat as shown in that report?

A. Yes, sir.

182 Q. It was closed up?

A. Yes, sir; it was closed up.

Q. And that report was sent to you of the deal?

A. Yes, sir.

Q. And the manner of closing it and the manner of fixing the gain or the loss?

A. Yes, sir.

Q. That was long or short?

A. That was short.

Q. You went short on that?

A. Yes, sir.

Q. And then you bought it in again?

A. Yes, sir.

Q. And you sold short August 24th 10,000 bushels?

A. Yes, sir.

Q. And August 30th you bought it in again?

A. Yes, sir.

Q. And made a loss of $100, as shown in that report?

A. Yes; that is a loss.

Q. Now take Exhibit 1–3, look at that; September 1st sold 5,000 bushels December wheat and August 31st bought 5,000 bushels December wheat. Is that wheat reported there bought under an order from you to Handy?

A. Yes, sir?

Q. And was it sold under an order from you to Handy?
A. Yes.
Q. Under what date does it appear to have been bought?
A. August 31st, 1888.
Q. And under what date was it sold?
A. September 1st.
Q. Was that long or short?
A. That was long.
Q. Does that report correctly show and state the manner in which that transaction was carried on and was closed?
A. Yes, sir; exactly as it was done.
Q. How was that loss made there? How was that amount of loss made?
A. I bought it at a higher price than I sold it.
Q. How do you get at the amount of loss?
A. By the difference in the market price at the time I bought it and the market price at the time I sold it.
Q. The fluctuations in the market?
A. Yes, sir.

Objected to as leading.

Q. How did you make that loss (showing Exhibit 1–4 to witness)?
A. That is a gain.
Q. How did you make that gain? How did you ascertain that gain? What is that gain? How is the gain made there?
183 A. That is the difference in the price between the time I bought it and the time I sold it, on August 31st, at 92 cents. I sold that amount out September 1st at 93⅛, and that shows 1⅛ cents difference between the market, and deducting commission it leaves me a profit of $50.
Q. I now call your attention to Exhibit 1–4, dated September 10, 1888. State whether the wheat that was bought was bought on your order to Mr. Handy.
A. Yes, sir; it was.
Q. It was bought September 8th?
A. Yes, sir.
Q. When was it sold?
A. It was sold, the first part, the first of September, 5,000 bushels, and then the second part the 3rd of September. There are two sales.
Q. Was there a loss or a gain there?
A. There was a gain.
Q. How do you make that gain?
A. By the difference in the market when I bought and when I sold.
Q. At what price was it bought?
A. That is a short deal. It was sold—it was bought at 93⅜.
Q. At what price was it sold?
A. Half of it was sold at 93¼ and the other half at 94.
Q. Does that report, then, correctly state the transaction as to that deal?
A. Yes, sir.

Q. The entire transaction?
A. Yes, sir.
Q. Now, take Exhibit 1–5, October 6th——

Mr. KIRTON: With the exception of one transaction in January and another in June, it is admitted that all those transactions were the same.

Mr. MOORE: I suppose it is understood that on the 6th of February there was a selling out of all the option deals, and this is subsequent to that time in February that this purchase of 40,000 bushels of May wheat and the 25,000 bushels of July wheat was made.

Mr. KIRTON: Yes.

Mr. MOORE: And that was carried down to April 29th?

Mr. O'BRIEN: If Mr. Moore proposes to show that this transfer of the May wheat to June was unauthorized and void we
184 object to the same, as there is no issue raised on that in the answer and the same is not pleaded.

The COURT: As I understand it, he says that you charged him for money advanced upon a settlement of a purchase of wheat or a sale of wheat which fell due on the first day of May or at any time during the month of May; that instead of selling it out, as you had a right to do, that you without any authority sold it and bought June wheat for him, and that you have charged him with the loss upon that transaction; and he says he never authorized that transaction.

Mr. O'BRIEN: But he has not pleaded that.

The COURT: Is it necessary to plead it? I may have been wrong in my construction at the outset, as to these pleadings, as to whether or not the only question was whether the contracts were legal and the money was advanced for a bet, but you have introduced your proof upon that. Now, the defendant proposes to attack the authority by which a portion of this money was expended, not claiming that it was an illegal contract, as far as the transaction was concerned, but if the jury should believe it was a fair contract, that it was a legitimate and *bona fide* contract, the defendant claims that, as far as the change from May wheat to June wheat was made on the 29th of April, it was not authorized, and that it was done without any request or instruction on his part, and that if there was any loss from that that it should be charged up to the plaintiffs and not to him. I think that he can introduce that testimony.

Plaintiffs' counsel excepts to the ruling.

The COURT: If it was necessary for him to amend his pleadings he could do so, so as to make them conform to the proof in the case.

Exhibit "M" shown witness, under date of 4, 29, '89, and also Defendant's Exhibit No. 3, which is a telegram of the same date.

First, as to Exhibit "M," was that received by you from Boyd Bros.?

A. No, sir.
185 Q. It was not received by you?
A. Received by me?

Q. Yes; that is my question. Was Exhibit "M" received by you?

A. Yes.

Q. Does that paper state what I read?

A. It should.

Q. Now state what it does read.

A. 40,000 bushels June wheat bought 82¼; 40,000 bushels May wheat sold 81½ cents.

Q. When did you receive that?

A. It is dated 29th of April. I presume I got it a day or two after by mail.

Q. It is dated on that date?

A. Yes, sir.

Q. You must have received it at or about that date?

A. Yes, sir.

Q. Now look at the other paper, the telegram, and read that telegram.

A. "April 29, '89. Minneapolis. Theodore Hansen. Shall we change your May wheat over to June? Today is your last chance. Answer. J. E. Boyd & Bros."

Q. State whether or not you gave these plaintiffs any authority to buy June wheat, as referred to in that report or telegram.

A. No, sir.

Q. Will you state whether or not you gave to these plaintiffs any authority to sell the May wheat stated in that report?

A. No, sir.

Q. State, as to that telegram, whether or not you answered it, or what you did in the premises. State whether or not you answered that telegram, and what action you took, if any.

A. I don't remember whether I wrote any answer to that telegram at all or not. As far as I remember, I got two telegrams that day.

Q. Another telegram beside that?

A. I have not got it. I have lost it.

Q. That is all there is to that?

A. I think I sent them an answer—a telegram that day and said——

Objected to.

Q. Besides that telegram that you think you sent, what else was done about it, if anything?

A. Nothing at all.

186 Q. Coming down to the June sale, I call your attention to 1–18, Defendant's Exhibit.

A JUROR: I understand you to say you never made any answer to that telegram?

WITNESS: I never gave them any instructions concerning that wheat.

A JUROR: You never made any answer to this telegram?

A. I think I wrote one and sent a telegram to him.

A JUROR: In reply to this?

WITNESS: Either that or another one.

The COURT: Is that one of the telegrams that were presented by the agent of the company?

Mr. KIRTON: Yes, sir.

The COURT: Did you ever make any objection to that account that was rendered you there?

WITNESS: Yes, sir.

Court here took a recess until 2 p. m. o'clock the same day, at which time the further hearing of the case is proceeded with as follows:

THEODORE HANSEN, the defendant—examination-in-chief continued by Mr. MOORE:

Q. I call your attention to this report 1–18; wheat purchased and wheat sold are reported on that paper. Read what that says; read what is reported there.

A. It is reported February 18, bought 5,000 bushels July wheat at 94⅜; February 19, bought 20,000 bushels July wheat at 94½; April 29, bought 40,000 June wheat at 82¼; June 8, sold 25,000 July wheat at 77¼; and sold 40,000 bushels June wheat at 79. Commission, $81.25; net loss, $5,706.25.

Q. Is that bought and sold May?

A. That is June.

Q. Now look at Exhibit 1–17. State the purchases and sales on that paper.

A. April 29, 1889, account purchase and sale 40,000 bushels May wheat.

187 Q. That is a sale?

A. Yes, sir; April 16, bought 10,000 bushels May wheat at 111¼; April 16, bought 20,000 bushels May wheat at 109⅞; April 16, bought 10,000 May wheat at 109½; April 29th, sold 40,000 May wheat at 81½; commission, $50.

Q. Referring to Exhibit 1–18, the entry bought April 29 40,000 June wheat at 82¼, state whether or not that purchase was ordered or directed by you or authorized by you.

A. It was not ordered or directed by me.

Q. I call your attention to 1–17; state whether or not that entry entered on April 29th of sold 40,000 bushels of May wheat at 81½ was authorized by you.

A. No, sir; it was not.

Q. Are those two entries that refer to the purchase and sale the same referred to in that report, Exhibit "M"?

A. Yes, sir; they are.

Q. As you understand it?

A. Yes, sir.

Q. I show you and call your attention to Exhibit No. 1–18, two sales referred to and reported sold 25,000 July wheat at 77¼ and sold 40,000 bushels June wheat at 79, and I want you to state

whether or not either one of those sales was authorized or directed by you.

A. Not either one of them was authorized by me.

Q. (Exhibit "C" of E. J. Noble's deposition shown witness.)

Plaintiffs' counsel states that all this evidence with regard to authority or direction of the defendant is taken under their objection, and the court recognizes that fact.

Q. State whether or not you ever saw that before.

A. I never saw that before.

Q. Or knew of its conditions?

A. No, sir.

Q. Now, I want to call your attention to refresh your memory and ask whether or not Mr. Brush advised you of this telegram and whether or not you had any conversation with Mr. Brush with respect to the subject-matter to which the telegram relates, authorizing or directing this change—this transfer from May to June?

A. No, sir.

188 Q. This telegram is dated April 29th, the date when this transfer took place. Here is a telegram from Mr. Brush which states: "Do not forget to change the Hansen business over." I will ask whether, looking at that and remembering as distinctly as you can, you remember whether Mr. Brush showed you that telegram or called your attention to it and whether you gave any directions with respect to the matter.

A. I never saw it and never gave him any directions with regard to it.

Q. Here is a letter "4, 26, '89; Theodore Hansen, Esq., Benson, Minn. Please wire us your instructions as to disposal of your May wheat. We can change it into June at a difference of about ½ to ¾ of a cent. If you want to change it over, you will have to do it before Thursday. (Signed) Boyd Bros., by G. M. Brush."

Mr. KIRTON: Have you got the original of that letter?

Mr. MOORE: No, sir; I have not got it.

Q. This seems to be the 26th and this telegram was the 29th; this transaction was the 29th. Do you remember the receipt of that letter? Did you receive that letter?

A. Yes, sir; I think I did.

Q. What did you do about that; did you answer it?

A. No, sir.

Q. Calling your attention to these two matters, the telegram and the letter, can you now remember any conversation or interview or talk with Mr. Brush? You say you didn't write to him; do you remember any interview with Mr. Brush about this matter when you were down in Minneapolis?

A. I don't remember I had any interview of that kind with him.

Q. Now, referring again to these 20 reports, number 1–1 to 1–20, inclusive, being all the reports, state whether or not in any of the purchases shown in those reports and ordered by you or in any of

the sales of wheat shown in these reports and ordered by you it was your intention in any instance to buy or sell actual wheat.

189 Objected to.

The COURT. I think he can state what his intention was. It is a question for the jury to decide whether the other party understood it as he did.

Objection overruled. Plaintiff excepts.

A. No, sir; it was not. It was not my intention either to receive or to deliver any grain on those contracts.

Q. I will ask you if it was your intention to buy or to sell any grain on those contracts—actual wheat?

A. No, sir.

Mr. MOORE: This is asked in connection with the examination of the witness previously had with regard to these reports.

The COURT: Unless he can show that that contract was so understood by the other partles, it would not affect this case.

Q. Have you summarized all that was done on this account—the amount of wheat testified to in this case that was put up as collateral and the amount of money, the proceeds of that, that was paid to these parties?

A. I cannot tell exactly; I can pretty near. I shipped in about 4,000 bushels in the latter part of February, and the proceeds of that, about $3,000—it was exactly $3,000—I drew out from Kirkbride and paid over to this firm. Later on in the spring, in April or May—I think it was partly in April and partly in May, probably—I shipped—I was to ship in the balance of the wheat that was left and Kirkbride to turn it over as fast as they got the accounts of the sales, and they turned it over to this firm, the proceeds of this wheat that was to come in.

Q. How much was it?

A. About 25 or 26 hundred dollars.

Q. Has there been any further proceeds of the wheat under these warehouse receipts actually paid over to them to your knowledge?

A. Yes, sir.

Q. That would make about $5,500 or $5,600?

A. Yes, sir.

190 Q. It is in evidence here that these receipts were put in in January—turned over as collateral, as I understand it?

A. Yes, sir.

Q. What were they collateral to—to secure what?

A. That was to secure an option deal I had at the time that was issued.

Q. What was that?

A. It was about 90,000 bushels I had at that time.

Q. That was security for those option deals at that time?

A. Yes, sir.

Q. Were those deals subsequently closed?

A. They were closed the 5th or 6th of February.

Q. At a loss?

A. Yes, sir.

Q. What was the loss, if you remember?

A. I had quite a heavy loss. I cannot remember exactly the amount; it was about seven or eight thousand dollars. I cannot tell you the exact amount.

Q. Had you a credit?

A. I had a credit of about $2,000 on the books when I took these deals.

Q. So with your wheat receipts there was an estimate of about $11,000 as collateral security for your option deals?

A. Besides the cash money I paid in besides the wheat.

Q. How much cash money did you pay in?

A. $5,000.

Q. And 9,700 bushels of wheat?

A. Yes, sir.

Q. And had a credit of about $2,000?

A. Yes, sir.

Q. In February, when you started?

A. No, sir; that was earlier in the winter.

Q. Altogether down to that time?

A. Yes, sir.

Q. In February, as I understand it, your option deals on February 5th or 6th were all closed out?

A. Yes, sir.

Q. And the losses were ascertained?

A. Yes, sir.

Q. Do you remember how much that loss was?

A. About $9,000.

Q. Did those losses exhaust these collaterals and also the
191 moneys you had paid, and also whatever credit you had to your account?

A. No, sir; I could not say how much there was left; that depends a good deal on the cash value of the wheat, as the value was in the warehouse receipts. Cash wheat commenced to lower in price, and as it decreased in value the value of the collateral commenced to do the same as the market went down and the debt increased.

Q. There was evidence about a certain balance of the proceeds under these warehouse receipts that had not been paid over. Will you explain to the court and jury how it was that it is not paid over?

A. Yes, sir; I was paying the last of that wheat in the warehouse receipts, and when it was shipped in I was to have back my surrendered tickets or warehouse receipts. There were three of them, and I demanded the warehouse receipts back as fast as I shipped in the wheat, and they refused to give them to me. I had shipped in nearly everything—I think about three car-loads were left—and I had not got one receipt back, and I demanded them and told them they should stop the delivery of any more money. I was not going to let them have my paper if they would not pay for it and give

me back my receipts. Mr. Kirkbride made these sales; the plaintiffs had nothing to do with him.

Q. Kirkbride actually paid the money?

A. Not at first; I drew the money and handed it over to them.

Q. A question sprang up between you as to the surrender of your warehouse receipts when you paid enough to cover the wheat receipts?

A. Yes, sir; I wanted the receipts back.

Q. Where is the balance of that money—the proceeds of the wheat under those wheat receipts?

A. Kirkbride got it.

Q. Why isn't it paid over to the plaintiffs?

A. Because they never returned the receipts.

Q. Because they refused to give up the receipts?

A. Yes, sir.

Q. You say the money is with Kirkbride?

A. Yes, sir.

Q. Except that collateral sold by him under it?

A. Yes, sir.

Q. And you instructed him not to pay the money unless
192 he got the receipts back?

A. Yes, sir; I did instruct him not to pay over any more money before he got the warehouse receipts for it.

Q. State whether or not they refused to give up the wheat receipts.

A. Well, they must have or else they would have had it. They didn't give up the receipts.

Witness THEODORE HANSEN, the defendant, on being cross-examined by Mr. O'BRIEN, testified as follows:

I am 44 years old; have lived in the United States not quite 22 years and in Minnesota since 1869. I have lived in Benson since 1870, and have been doing a general merchandise business there since that time. Besides that I have been buying wheat. The largest amount I have bought in any one season is about 125,000 bushels. I own one elevator and two warehouses. The elevator is situated in Bloxam, Minnesota, on the H. & D. road. I have been buying and selling and operating in wheat in this elevator and these warehouses for nine years, or since 1880.

Q. Did you ever operate in the Chicago market before you commenced to operate through these plaintiffs?

A. Yes, sir.

Q. How long before you went to these plaintiffs had you been operating in Chicago, in the wheat market there, in grain?

A. I had some deals occasionally; I think it was two years before.

Q. Had you ever been to Chicago?

A. Yes, sir.

Q. Had you ever been on the board of trade there?

A. I have been there; yes, sir.

Q. Have you ever had in progress any trade through any brokers while you were in Chicago?

A. I have.

Q. To what extent have you operated on the Chicago grain market through brokers, through the Chicago board of trade, before the time you hired Boyd Brothers—about how many bushels of grain had you bought and sold on that board of trade?

A. I could not say.

Q. Was it over a million?

A. I don't think it was a million.

Q. You were pretty thoroughly familiar with the business before you hired these men?

A. I had done some trading.

193 Q. Isn't it true you knew all about the business and knew about the business before you employed these men?

A. In a general way, I had a general idea.

Q. In Minneapolis were you not frequently in the chamber of commerce?

A. Yes, sir.

Q. You visited the chamber of commerce there for the purpose of selling grain?

A. I was selling a good deal of wheat there; yes, sir.

Q. And buying?

A. No, sir.

Q. You were selling a good deal of wheat?

A. Yes, sir.

Q. So you were dealing in Chicago and Minneapolis, in the chambers of commerce in those places, in wheat?

A. Yes, sir; I was not dealing myself.

Q. You were having people deal for you?

A. Yes, sir.

Q. In that business you were selling actual wheat you had on hand?

A. Yes, sir; cash wheat.

Q. And you did that through brokers?

A. No, sir.

Q. You did it yourself?

A. I did it through commission men.

Q. Have you not sold wheat in Minneapolis for future delivery upon which you afterwards delivered actual wheat—cash wheat?

A. I do not remember that I sold any.

Q. Will you say you didn't?

A. I won't say I did not.

Q. Isn't it probable that you did?

A. I had some option deals in Minneapolis; I do not know whether that was cash wheat or not.

Q. Do you know of any merchant west of Wilmar or Litchfield or the Big Woods who has been dealing more in wheat than you have? Isn't it true that since you have been in this business you have been one of the largest dealers on the Manitoba road west?

A. No, sir; I don't know of any one else's business.

Q. When you went to Mr. Handy you say you asked him what the commissions of his principals were—what they were charging for commissions?

A. Yes, sir.

194 Q. And he told you, didn't he?

A. Yes, sir.

Q. He told you how much the commissions would be?

A. Yes, sir.

Q. And he also told you you would have to keep up your margins, didn't he?

A. Yes, sir.

Q. You knew at that time that these men were operating on the board of trade in Chicago?

A. I supposed they were; I didn't know that personally.

Q. Didn't you intend that Handy and Boyd Brothers should operate for you, under your orders, on the board of trade in Chicago?

A. Yes; I expect so. They were represented to me as brokers in Chicago.

Q. You wanted to deal in Chicago wheat?

A. Yes, sir.

Q. You had to hire some one in Chicago—some Chicago commission-house—to do that for you?

A. Yes, sir.

Q. And so you hired these men?

A. I gave them the deals; yes.

Q You knew that those transactions for you were to be made on the board of trade in Chicago?

A. I didn't know where it had to be conducted. I knew they were brokers in Chicago and bought and sold wheat.

Q. Didn't you know when you made these orders for them where they conducted these operations? Didn't you know that they were to be conducted for you on the board of trade in Chicago?

A. I supposed they were.

Q. You believed they were?

A. Yes, sir.

Q. You also knew or believed that that board of trade had certain rules and regulations under which business was transacted?

A. I didn't know anything about their rules.

Q. When did you first find out about their rules?

A. I don't know; I saw their rules in court.

Q. Didn't you furnish your counsel with a copy of those rules? The copy you have got—didn't you furnish him with them?

A. Yes, sir; it was handed me by a man in Minneapolis.

Q. When?

A. It was the other day.

Q. For use in this trial?

A. Well, I don't know whether they were for use in this

195 trial or not.

Q. You took them and thought you would give them to your lawyer?

A. Yes, sir.

Q. Do you really mean to tell these gentlemen that you didn't get these rules for the purposes of this trial?

A. No; I thought there might be something in it that the lawyers might like to see.

Q. Then you did get them for the purposes of this trial?

A. To that extent; I thought there might be something in it.

Q. You understood you had to pay a margin—that is, you had to furnish your brokers margins on these purchases when you ordered them made?

A. Yes, sir.

Q. That margin was the amount of money that you would have to put up in making a purchase of wheat?

A. Yes, sir.

Q. He told you about that, didn't he?

A. Yes, sir.

Q. You had to put that up if you gave an order?

A. Yes, sir.

Q. And you also agreed with them to keep these margins good?

A. Yes, sir; I did.

Q. And you also knew that if you bought some wheat at a certain price and it went down that you would have to make your margin good and put up more money?

A. Yes; I understood it that way. I understood that if I wanted to keep my deal I had to have a margin, and when the margin was out the deal was out.

Q. Suppose you ordered these men to buy 20,000 bushels of wheat, and there was no margin up, and they trusted you for the very margin, who do you suppose would be responsible for the money if the market went against you?

A. Well, sir, I understand I have got to have a margin up before I can have a deal.

Q. Don't you know that these men trusted you right along for every margin in the business they did for you?

A. I had margins up, but it was not in money; it was in elevator receipts.

Q. Don't you know that these men trusted you right along
196 for every margin in the business they did for you?

A. No, sir; I did not.

Q. Didn't they?

A. I do not understand it that way; I understand I had margins up. They called on me for more margins and I refused to put up any more; I said that is all I could put up.

Q. Now, you are the man that gave the orders for all these sales and purchases of wheat, excepting this one in April; with the exception of that one, you gave orders to these men to buy or sell wheat for you, just as this evidence shows they did buy and sell it?

A. Yes, sir.

Q. Except that one deal, they did sell and buy as you told them to do?

A. I gave no orders after February.

Q. Except this matter, these men obeyed the orders you gave them—they bought when you said buy and they sold when you said sell?

A. All except the last two orders; yes, sir; all the rest.

Q. Every bushel of wheat that they bought, with that exception, you ordered them to buy for you, and every bushel of wheat that they sold, with that exception, they sold for you?

A. Yes, sir.

Q. Who do you understand were to get the profit that was made on these purchases and sales?

A. If there was a gain, I was to have it.

Q. And that profit was money, was it not?

A. Yes, sir.

Q. And you were to have it?

A. Yes, sir.

Q. Supposing a loss was made—that is, money lost—who was to lose the money?

A. I was to.

Q. You were the man to pay the losses, if there were any, and you received the profits?

A. Yes, sir.

Q. If these men paid out any money for you on your losses you had to make it good to them, didn't you?

A. Yes; as far as my margin came in.

Q. How much money did these men pay to you as profits
197 during the time you had them employed by you?

A. These statements show that.

Q. Did they pay you $10,000?

A. Yes, sir; about $11,000, I think.

Q. Then, you think they paid you over $11,000 in profits during that time?

A. Yes, sir; I think I drew out about $13,000, but of that $2,000 was margins that I put up before.

Q. But still, as you sit here, you are $11,000 ahead as the result of their work?

A. Yes, sir; I was.

Q. And if you can beat in this lawsuit, you don't have to pay them back that money on your losses, but you go out of these trades $11,000 ahead and they will go out $17,000 behind?

A. No, sir.

Q. That is, these men will pay you for the benefit of doing your business $17,000?

A. No, sir.

Q. You say these men never trusted you for margins; do you think you are entirely right about that?

A. I don't know how you would consider it.

Q. I am only considering it as the thing would be considered.

A. There may be margins lying out; yes, sir.

Q. Did you write that letter (showing paper to witness)?

A. Yes, sir; I did.

Q. That is your handwriting?
A. Yes, sir; I wrote that letter.

Counsel for plaintiffs produces letter marked Exhibit "H 9," dated December 2nd, 1888; offered and received in evidence without objection and read to the jury as follows:

"BENSON, MINN., *Dec.* 2, 1888.

Chas. E. Handy, Esq., Minneapolis, Minn.

DEAR SIR: Yours of yesterday's date to hand and fully
198 noted. As to the funds, I wish to say that I have none in the bank at present, but I have the proceeds of four cars of wheat at Conover, Gee & Co., Minneapolis, which you can draw, if necessary. I shall write them to that effect.

In case they shouldn't happen to have the funds out of said wheat yet, I would kindly ask you to wait till they get it, and in case market goes against me more, I shall ship in wheat, so as to keep my deals protected. I have some cash on hand here, but I would like to use that in buying cash wheat.

My opinion is that wheat will be scarce in the near future.

Hoping that as above stated will be satisfactory to you, I am remaining

Yours truly, THEO. HANSEN."

Q. You wrote that letter?
A. Yes, sir.
Q. Was not that a letter asking them to trust you for margins and to wait on you?
A. Wasn't that an order on Conover to draw on them?
Q. When did you first learn of this transfer—this transfer of May wheat into June?
A. Shortly after it was done.
Q. When did you object or find fault with them for having done that?
A. When I met Mr. Murphy in Minneapolis.
Q. That was when?
A. That was in June.
Q. That was in June?
A. Yes, sir; it was the first time I was down after that.
Q. Then, the first time that you made any objection to having transferred that May wheat to June—that is, that it was done without your authority—and the first objection that was made was made when Mr. Murphy was in Minneapolis, on the 10th of June following?
A. Yes, sir.
Q. That is the first time you objected?
199 A. Yes, sir; it was.
Q. In the meantime you had been writing and you had been telegraphing to these people, and they had been writing and telegraphing to you, and you had never made any objections?
A. I don't remember.

Q. Will you say you ever made any objection before you saw Mr. Murphy in Minneapolis on the 10th of June?

A. I do not know that I did.

Q. Don't you know that you didn't?

A. No, sir; I don't think I made any until I saw Mr. Murphy.

Q. Here is a letter of the 17th of May in answer to one of theirs; I presume that is in your handwriting?

A. Yes, sir.

Q. At that time you knew, and you had known for 18 days, that they had made this transfer of May wheat into June in Chicago, as you say, without your authority; you knew that, didn't you?

A. I suppose I did.

Q. And with that knowledge you sat down and wrote this letter?

A. Yes, sir.

Letter marked Exhibit "H 14" offered and received in evidence without objection and read to the jury as follows:

"BENSON, MINN., *May* 17, 1889.

James E. Boyd & Bro., Chicago, Ill.

GENTLEMEN: Your message is received. In answer will say that out of the 9,472 bushels wheat for which you hold receipts I have shipped you eight cars, or 4,000 bushels, before and proceeds of the same 3,000 were paid you at the time. The balance of that wheat will be shipped as soon as cars can be obtained. I'll ship it to G. B. Kirkbride & Co., Minneapolis, and they will turn over the proceeds to you the same way as was done with the first lot.

The reason why I hav'n't shipped it before is this: that I
200 have been *been* expecting the market to improve a little, so as to get as much money out of it as possible, which would be to your benefit as well as mine.

Yours truly, THEO. HANSEN."

Q. You wrote that letter on the 17th of May?

A. Yes, sir.

Q. You had known for 18 days at least of their having changed this May wheat over to June wheat, and that they had done that without your authority?

A. Yes, sir.

Q. And you promised in that letter to ship in more wheat to pay the very losses which you had incurred from that transfer without your authority?

A. That surrender was some wheat on losses that I had made in February.

Q. You don't say so; you say on the whole thing.

A. That was on losses that were on deals closed out on February 6th.

Q. Why didn't you say to them when you wrote this long letter—why didn't you say to them I object to pay any losses that were incurred on account of that change?

A. Because I didn't consider that I had anything to do with the deal.

Q. You never made any objection for some time after that, until Murphy came to Minneapolis and the whole thing was over?

A. I made it to Murphy then, that I didn't consider that the deal was mine.

Q. Why didn't you do it before?

A. They called on me and said that unless I would put up more margins they would sell out the deal. I told them I could put up no more margins; I said I couldn't put up any more.

Q. That was when you were sold out?

A. That was long before.

Q. Was it not part of you arrangement with these men that if you didn't put up margins enough to keep the deal covered,

201 that they had the right to sell out the deal for you?

A. Yes, sir; that is the way I understood it.

Q. Do you claim that at the time that they changed this May wheat to June—do you claim that on the 29th of April you had margins sufficient in their hands to cover that deal?

A. No, sir; I didn't have any margin long before that.

Q. Then they had the right, under your agreement with them, to sell that May wheat on the 29th of April?

A. I didn't consider that I had any wheat.

Q. They had a right to do that under your agreement with them?

A. They called on me—Mr. Brush called on me in the latter part of February for margins on my deals. He said I ought to have more margins on those deals. I told him I couldn't very well put up more margin, and then he went on in a couple of days again and showed me a telegram which read: We cannot possibly carry you any longer without you put up additional margin. I told him positively then that I could not put up any more margin.

Q. Had not these men a right to sell that wheat for you at any time after your margin was exhausted?

A. I took it for granted they would close my deal out when my margin was exhausted.

Q. Under your agreement, had not these men a right to close out your deal at any time after your margin was exhausted?

A. I do not know what right they had.

Q. Then they had the right, on the 29th of April, to sell that May wheat?

A. I do not know that. I do not know what right they had.

Q. Didn't you agree with them that if you didn't keep your margin up, they having bought wheat for you, that they could sell it?

A. Yes, sir. I didn't expect them to hold the deal any longer if I didn't put up a margin.

Q. So that you say because they had done just what they had a right to do, you are not bound by what they did?

(The witness makes no answer.)

202 Q. Isn't it a fact that on the 17th of May you wrote to them this letter telling them that you would pay as soon as you could get the wheat into market?

A. I would pay as far as my margin went; yes, sir.

Q. (Referring to the three warehouse receipts given by the defendant to the plaintiffs.) These aggregate 9,472 bushels?

A. Yes, sir.

Q. These were given to these men so that it would show that this wheat belonged to them as collateral security?

A. As collateral security.

Q. For any debt which you owed them at that time?

A. Yes, sir; at that time.

Q. How much did you owe them at that time?

A. The books will probably show.

Q. Your margin was out at that time?

A. Yes, sir.

Q. How much of this wheat were you to let these men have, and how much of it did you ever let them have?

A. Somewhere about $5,500 or $5,600.

Q. What would you call it worth as it was in the elevator?

A. It cost me at that time, or at the time when I bought it, over a dollar.

Q. Then it represented more than $9,400 worth of property?

A. Yes, sir.

Q. And out of that you say you have paid to them some $5,600—of this wheat?

A. Yes, sir.

Q. How much did you pay yourself?

A. $3,000.

Q. Who else paid the rest for you?

A. Mr. Kirkbride, he paid $2,500 or $2,600.

Q. The balance of the money belonging to this wheat is in Mr. Kirkbride's hands for these people?

A. Yes, sir.

Q. It is to be paid over?

A. Yes, sir; out of the proceeds of the wheat.

203 Q. If Mr. Kirkbride comes here today and we give him these receipts he is to pay us over the balance?

Mr. MOORE: No; I told him not to.

Q. You swore on your direct testimony that the reason you didn't pay this money over was because we didn't give you up these receipts?

A. Yes, sir.

Q. If we give you up these receipts now, will you take them and give us the money?

Objected to.

Q. Will you tell Mr. Kirkbride to pay over the money, the balance of that money, if we will give you these receipts now?

A. There is a different phase on it now. I would at the time; I would have paid every cent of it.

Q. Will you pay over the money due on these warehouse receipts, the balance of it, if we will give them to you?

Objected to as immaterial and incompetent.

The COURT: I think it is a fair question.
Witness makes no answer.

Q. Will you pay it over now if we will give you these receipts?
A. I don't know whether I would or not now, after they have brought suit.

Q. What do you point out in these transactions that you had with these men which was a gambling transaction and which was void in law? Will you point it out? Did you intend when you hired Boyd Brothers to make these deals for you in Chicago, did you intend when you started into this transaction not to deliver the wheat nor to receive any actual wheat?

A. I didn't intend to receive or sell any actual wheat.

Q. Did you intend to take the profits when there were profits and to throw the losses on your broker?

A. No, sir; I didn't; I intended to take the profits and the losses.

Q. Did you intend, when money was paid out for you in the business, if there was a profit in the business to take the money
204 and if there was a loss that these men should lose it?

A. No, sir.

Q. Did you intend if money was made to put it in your pocket and if money was lost to let these men shoulder the losses?

A. No, sir; that was not my intention.

Q. Did you intend to get these men to act for you, and that they should violate the laws or forfeit their position on the Chicago board of trade?

A. No, sir; that is something I never thought about.

Q. Did you hire these men for the purpose of breaking the law, or did you hire them for the purpose of doing an honest, legitimate business?

A. I took the chances on the market to do what was customary on the board of trade.

Q. Did you hire these men to do an honest business or to do a dishonest business?

A. I didn't mean to make any dishonest one.

Q. Did you hire these men to do a lawful business or an unlawful business?

Objected to as a question of law.

The COURT: He stated he intended to speculate on margins in a manner which is contrary to law. The question is asked him on cross-examination virtually whether the parties with whom he dealt, as a part of the transaction, knew that it was a gambling transaction and contrary to law, and whether he intended to have them do something contrary to law. I think the question is proper.

Objection overruled.

Q. Did you hire these men to do a lawful business or an unlawful business?

A. I understood that those deals were not upheld by law; that they couldn't hold law, but still it was an honest trade if you want to risk it.

Q. Was it your intention to have these men engage in a
205 business in which you would get the profits as long as there was any profit, and then it was lawful, but when you lost anything, then you would say it was unlawful and refuse to pay?

A. It was not my intention that they should lose any money on my deals.

Q. Did you require Boyd Brothers to agree that the only business that they should do for you would be a dishonest and unlawful business?

A. There was nothing said about that at all. I gave my orders. I was speculating on the market.

Q. Then these men never promised you to make a dishonest or unlawful trade for you?

A. No, sir.

Q. They only promised to fill your orders—to sell when you said sell or to buy when you said buy—that was all they promised?

A. I had no authority to force them to do anything of that kind.

Q. All that they agreed to do was to sell when you said sell and to buy when you said buy?

A. I gave in my orders the same as other speculators do.

Q. You gave in your orders and they didn't agree to do anything that was dishonest or unlawful?

A. There was no agreement.

Q. All the agreement was that when you gave your orders that you wanted they should execute for you they did it—when you told them to buy 10,000 bushels of wheat they bought it, and when you told them to sell 10,000 bushels of wheat they sold it?

A. We had no agreement.

Q. You hired them to buy and sell for you on the board?

A. Yes, sir, and they charged a commission for it.

Q. Then there was no agreement on the part of the plaintiffs that they should make an unlawful trade for you?

A. There was no agreement.

Q. As far as the unlawful part of it was concerned, that was in your mind, wasn't that so?

206 A. I understood the law was that way, that they couldn't hold me to the contract if I didn't want it myself—if I didn't want to.

Q. Why did you take this money that was made—why did you take this $10,000?

A. Because I made it.

Q. You didn't tell Boyd Brothers how you understood the law was?

A. There was no telling about it at all; there was no understanding about it.

Q. You kept this to yourself in your own breast; you didn't tell anybody about it; you kept still about it?

Witness makes no answer.

Q. As long as you were getting in the money, it was all right, and when you didn't——

A. It was all right, too. I paid as long as I could.

Q. You haven't lost anything yet—you are $10,000 ahead?

A. No, sir; I am not.

Q. You got your $10,000—you hav-n't paid the $17,000?

A. If you will allow me to explain I will tell you how it is I am not ahead. I drew out some money—about $9,000—and I took that money and invested it in cash wheat. I drew out $13,000 in all, and I paid in $5,000 in cash, and I paid in 9,472 bushels of wheat, except what little was left with Kirkbride.

A JUROR: Whom did you draw that $10,000 from; from Boyd Brothers?

A. Not $10,000. I drew $9,000.

Mr. O'BRIEN:

Q. You drew from them more than $10,000?

A. I drew out about $13,000 altogether.

Q. You drew from them—they sent you the money?

A. Yes, sir; and I paid in for margins something over $5,000 in cash, and then they got 9,472 bushels of wheat receipts, for which they got the proceeds.

Q. Do you claim they got $9,000 for that wheat?

207 A. No; the wheat fell in value, so there was a great loss on the cash wheat.

Q. How much of that wheat was sold in Minneapolis; 4,000 bushels of it?

A. I can't tell exactly where it was sold. I shipped it to Kirkbride. I think he sold part in Minneapolis and part in Milwaukee.

Q. Don't you know that Boyd Brothers never got a dollar of that 4,000 bushels of wheat? Why do you testify to that when this man Kirkbride is sitting here in the court-room?

A. I shipped the wheat to him from the elevator to Minneapolis to Kirkbride. As far I remember, part of it was sold in Minneapolis and part in Milwaukee.

A JUROR: You say you drew $13,000?

A. Yes, sir.

Q. And you say you paid in $5,000?

A. In cash; yes.

Q. How much of this wheat did you turn in along with the $5,000 in cash?

A. About $5,500 or $5,600.

Q. Of wheat?

A. Yes, sir; the proceeds of that wheat.

Q. Did you get any part of that money from your wheat back?

A. No, sir.

Q. Who got it?

A. Kirkbride got it.

Q. When you drew out that $10,000 from Boyd Brothers did you owe them anything then?

A. No; I had money coming.

Q. You had money coming clear?

A. Yes, sir.

Q. So if you had quit dealing then you would have been 10,000 dollars ahead?

A. Yes, sir.

Mr. O'BRIEN:

Q. You have testified that the balance of this money from the 9,472 bushels of wheat over and above the $3,000 you paid the plaintiffs and over and above $2,500 or $2,600 is still in
208 Kirkbride's hands; you so swore. Is that true?

A. Yes, sir; I understand that to be so.

Q. Is there a dollar of the proceeds of that 9,472 bushels of wheat in Mr. Kirkbride's hands?

A. I never drew it out.

Q. You never drew it out?

A. No, sir; not that money.

Q. You say the difference between $5,500 or $5,600 paid by you, the $3,000, and the $2,500 or $2,600 and the value of the 9,472 bushels of wheat sold by Kirkbride and represented by these warehouse receipts—the difference is still in Kirkbride's hands?

A. Something about that difference; that might not be the exact difference.

Q. There is some of that money?

A. Yes, sir.

Q. Some appreciable sum?

A. Yes, sir.

Q. Don't you know that Kirkbride has not had since they sold that wheat a dollar of that money in their hands—don't you know that you drew every cent of it?

A. I didn't draw out the money, but I was owing Kirkbride at the time.

Q. Don't you know that they haven't got a dollar in their hands and never had since that time belonging to you?

A. No, sir; they have had lots of money of mine at some time.

G. E. KIRKBRIDE, sworn on the part of the plaintiffs in rebuttal, testified as follows:

I reside in Minneapolis. I am in the commission business there, and know the defendant Hansen and the plaintiffs.

Q. It has been testified that there were some 9,000 bushels of wheat shipped under certain wheat receipts, viz., January 4th, 4,472 bushels; January 14, 2,000 bushels, and January 24th, 3,000 bushels, making an aggregate of 9,472 bushels, belonging to Hansen and shipped from his elevator, which was said to have been shipped to you. Do you remember receiving that wheat?

A. No, sir.

209 Q. Did you receive it?

A. We have received consignments from Hansen for 4 or 5 or 6 years every season.

Q. How much money have you ever paid to Boyd Brothers out of the proceeds of any wheat consigned to you by Hansen?

A. I think we paid on Hansen's order eight cars.

Q. 4,000 bushels?

A. Yes, sir; about that.

Q. Did you pay out to Boyd Brothers any other money?

A. No, sir; I think not.

Q. Have you on hand or have you ever had on hand a balance of moneys derived from the sale of the 9,472 bushels of wheat from these wheat receipts?

A. No.

Q. To be paid to Boyd Brothers?

A. No, sir; not to be paid to them.

Q. Have you ever had in your hands any sum—the proceeds of wheat consigned to you by Hansen to be paid to Boyd Brothers on the surrender of these wheat receipts?

A. The proceeds of 8 cars.

Q. Besides these eight cars?

A. No, sir.

Q. When did you pay over this $2,400 to Boyd Brothers?

A. I don't know exactly the date; I think on or about June 6th, 1889.

Q. Since that time have you held any money belonging to Hansen?

A. No, sir; we have advised him, as we do our customers from the country when they ship their wheat in to us, that we credit them with the proceeds and charge them with the draft.

Q. To whom have you paid over all the proceeds and moneys from Hansen's wheat since you paid those $2,464?

A. To Mr. Hansen himself.

Q. There has been no deposit of wheat with you since last January which you are holding for the benefit of Boyd Brothers?

210 A. No, sir.

Q. You heard his testimony that you held the proceeds of 9,472 bushels of wheat?

A. I did hear that.

Q. That isn't so?

A. No, sir.

Q. Did you ever receive any instructions from Mr. Hansen not to pay any of the funds over to Boyd Brothers?

A. Yes, sir; it was after this payment.

Q. You say he did inform you not to pay any more of the proceeds of that wheat over to Boyd Brothers?

A. Yes, sir; I think we gave this check, and I think our orders from him were not to pay any money over to them.

Q. Where did the rest of the money go that you did not pay over to them from the wheat that you subsequently received from him?

A. To himself.

Q. Subject to his draft?
A. Yes, sir.

The witness, on being cross-examined by Mr. MOORE, testified as follows:

Q. You say you were constantly receiving and selling wheat on his account?
A. Yes, sir.
Q. So you never distinguished this wheat from any other?
A. No, sir.
Q. Nothing to indicate, as far as the shipments were concerned, that it was a part of this or some other?
A. No, sir.
Q. It does appear that somewhere along you had sold wheat on Hansen's account to the amount of $2,400, more or less?
A. Yes, sir.
Q. And that that had been paid to Boyd Brothers in some way?
A. Yes, sir.
Q. How came you to do that?
A. On Mr. Hansen's order.
211 Q. You do not remember whether it was a written or verbal order? Do you remember what it was, whether it was distinctly for the amount for which you were to draw your check or whether the order contained other and further reference to payment?
A. My recollection is that I received an order, either verbal or by letter, from Mr. Hansen to pay the proceeds of some cars he might ship to Boyd Brothers, and certain cars came and were sold and the proceeds of those cars were paid to Boyd Brothers or their representative, and we received notice not to pay any more money to them.
A. He might possibly have come in after this check was paid. In thinking it over, I think he came in personally and learned from my book-keeper how much had been paid over on them, and I think his order was given then not to pay over any more.
Q. Do you remember distinctly whether that order was not to pay over any more unless they surrendered the wheat receipts, or was it absolute?
A. No, sir; it was absolute.
Q. Can you fix about the date when that order was given?
A. No, sir; I could not say. I should judge very shortly after payment was made. I think that payment was on the 6th of June and I presume it was about that date, June 6th, 1889.

L. E. MURPHY, recalled on the part of the plaintiffs in rebuttal, testified as follows:

Q. Did you hear the defendant's testimony, that he complained to you, at the time he saw you in June, with reference to the transfer from May wheat into June wheat?
A. I was not here this morning.

Q. He testified in the court-room today that when he saw you in June, in Minneapolis, he complained to you about the house having transferred this May wheat into June wheat.

A. He didn't make any complaint of that kind to me in Minneapolis.

212 Q. Did he ever make any complaint to you anywhere else?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Or at any place?

A. No, sir.

Q. Did he ever question the authority under which that change was made?

A. No, sir; not to me.

Q. Or in your presence or hearing?

A. No, sir.

Q. In relation to this $3,000 he paid over, which was the proceeds of the 4,000 bushels of wheat in the hands of Mr. Kirkbride, how was it about that?

A. I was in charge of Mr. Boyd's office in Minneapolis during the month of February. The money was not paid to me. It was paid after I went away. I had charge of the office from the time Mr. Handy left until Mr. Brush came there. I do not think any money was paid to me at all during the month of February; I would not be sure. I do not think there was.

Q. Was there anything paid to you on this wheat for which you held warehouse receipts?

A. No. He told me he would ship in some wheat, enough to pay me $3,000. There was nothing said at all with regard to wheat receipts at that time.

Q. Had that payment any relation to the wheat receipts for the 9,000 odd bushels?

A. No, sir; when I went there he told me he would pay me $3,000. He said he could not raise the money in St. Paul and he said he would go home and ship in wheat enough to pay me $3,000. It had nothing to do with those warehouse receipts at all.

Q. Did you have any agreement with Mr. Hansen in relation to these warehouse receipts, as to how long they were to run?

A. I told Mr. Hansen—I explained to him—I think he had 90,000 bushels of May wheat in our office, and he gave us

213 orders to sell it when it struck a dollar, which we did. When I first went to Minneapolis, the first of February, 1889, I held the warehouse receipts. I either took them with me or they were there. He had 90,000 bushels of May wheat in our hands that we had for him, and he gave me an order to send them; that when it struck a dollar they were to sell it out, and it was sold out about the 6th of February, and that netted him about an even dollar. After all this was sold out he owed us about $7,000. I told him if he would pay me $3,000 in money I would hold these wheat receipts for 90 days for any trade he wanted to make in the future.

In case this loss absorbed that wheat I agreed we could not sell that wheat for 90 days; if his losses absorbed the 9,000 bushels of wheat I was to carry these receipts for 90 days before selling them.

Q. So that this $3,000 was no part of those wheat receipts?

A. No, sir.

Q. It didn't diminish the collateral security of the warehouse receipts by that amount?

A. No, sir.

Q. It wasn't a payment upon them?

A. No, sir.

The witness on being cross-examined by Mr. MOORE testified as follows:

Q. I understood you to say that on February 6th you closed out those trades and he was even on the market after that 90,000 bushels of wheat was sold?

A. No deals, either long or short.

Q. You had a talk with Mr. Hansen about raising $3,000 to pay you?

A. Yes, sir.

Q. On the deficit on that 6th of February sale?

A. No, sir.

Q. It wasn't?

A. No, sir. When I first went to Minneapolis he was about $9,000 behind. He had 90,000 bushels of May wheat and he gave me an order to close it out at a dollar, and that was done, and then he owed us about $7,000. I told him then if he would pay me $3,000 I would carry these wheat receipts as collateral for 90
214 days and for any deals he might want to make in the future, and in case there was a loss we could not sell the wheat receipts or call on him for money for 90 days.

Q. Do you remember whether or not it was stated that that amount of wheat, $3,000 worth, was to be taken out of the wheat represented by these wheat receipts?

A. He didn't say a word about that. I asked him for cash and he couldn't raise it, he said, and he came to St. Paul and said he couldn't raise it. He said he would go back home in the country and ship in enough wheat to pay me $3,000.

At the close of the testimony the court charged the jury as follows:

GENTLEMEN OF THE JURY: This case has occupied the attention of the court for a number of days, involves quite a large amount of money, and the questions to be settled are important. I hope I shall be able in my charge to so instruct you upon the law that you, having all the facts fully before you, will be enabled to arrive at a conclusion and settle this controversy by your verdict.

This is an action in which the plaintiffs seek to recover for alleged advances on account of the defendant, made at his request, and also for agreed commissions for services rendered on his account. Plaintiffs during the years 1888 and 1889, when this

alleged indebtedness accrued, were brokers and commission merchants doing business in the city of Chicago and connected with the chamber of commerce of that city, where they bought and sold for persons who employed them.

They had a branch office in the city of Minneapolis and a manager in charge. The defendant is a merchant and wheat dealer residing at Benson, in this State, and the alleged advances it is claimed were made on his orders for the sale and purchase
215 of wheat in Chicago, for future delivery, from the Minneapolis office. The time during which these transactions occurred commenced in August, 1888, and were concluded and the whole transaction finally closed up in June, 1889. The plaintiffs claim that the defendant applied to the Minneapolis office to employ them to sell and purchase wheat for future delivery; that he enquired of the manager the commission to be charged, and was informed of the rate, and also told by the manager in charge that it was a good time to make some scalps, but what that term means has not been developed by the testimony. It is claimed on the part of the plaintiffs that he was informed of the rate of commission for their services; that the contracts made for him would be subject to the rules, usages, and regulations of the chamber of commerce of the city of Chicago, and that in all cases actual wheat must be purchased and sold and the margins kept up to protect them against loss.

The defendant transacted business through the plaintiffs from August, 1888, until June, 1889, according to the plaintiffs' evidence, when all the contracts were closed. The defendant testifies that no particular agreement as to how the business was to be conducted was made at the time of his interview with the manager in Minneapolis in August, but he admits that the plaintiffs made advances for him previously and up to February 6, 1889, and testifies that the only transactions of his open and unsettled at that time were a contract of 40,000 bushels of wheat for May delivery and one of 25,000 bushels for July delivery. The first of these defendant claims was transferred without his orders from May to June wheat; and before proceeding to speak about the chief controversy in the case I will call your attention to this transaction. The testimony of the defendant is that he never gave any orders for or consented to such transfer, and that the plaintiffs, if they so made it, assumed the burden of the transaction. The evidence of the plain-
216 tiffs with regard to the authority to make the transfer on defendant's account is circumstantial; but evidence is introduced tending to show a ratification by the defendant of what had been done, not only by direct admission of the whole indebtedness, a part of which is made up of losses on the contract transferred from May to June, but also by evidence that the defendant was informed of the fact of the transfer, and that a report and statement were made to him on the 29th day of April, when the change was made, and that no objection was made to the correctness of the statement of account so made and rendered.

Now, if you find from the evidence that the plaintiffs, about April

29th, 1889, informed the defendant by letter that the 40,000 bushels of May wheat in question could be at that time changed to June wheat, and that the defendant made no answer thereto, and if you further believe from the evidence that said May wheat was changed over into June for and on account of the defendant, and that the plaintiffs rendered an account—a report and statement—to defendant that said change had been made, and the defendant received such report and statement, and retained it, and made no objections to said change of said May wheat to June, then such facts amount to and were a ratification on the part of defendant of the acts of the plaintiff- in making such change.

The chief controversy in this case is about the character of the transactions between the plaintiffs and the defendant, which is the basis of this suit. It is urged by the defendant that all these transactions were wagers, and that no wheat was ever in any instance intended to be received or delivered by him, and that the plaintiffs so understood it, and that the evidence and the reports of sales and statements made to him show that fact, and that these transactions were in violation of the statutes of the State of Illinois, which were read to you by counsel for the defendant. The plaintiffs' theory is, and evidence has been introduced tending to sustain it, that
217 they were employed by defendant, through the Minneapolis office, as brokers and commission merchants, to purchase or sell wheat for future delivery on his account, and that such sales and purchases were to be made on the Chicago board of trade with the members thereof; that such contracts were to be governed by the rules and usages of such chamber of commerce, and that in every instance actual delivery of wheat was intended by the parties to the contracts made for the defendant's account, and that these contracts were closed and settled up by the plaintiffs in accordance with these terms and at the defendant's request, and advances were made and their own money paid out for his benefit.

The purchase and sale of wheat to be delivered at a future time, the day of the month for the delivery being optional, is a fair contract, if the intention of the contracting parties is to deliver the wheat, although the wheat is not in the possession of the seller at the time of the contract of sale; but if the contract does not contemplate a delivery of wheat, but both parties thereto intend a settlement of the contract by merely paying the difference between the contract and the market price, then the transaction is illegal within the law of the State of Illinois. Such a contract is gambling, contrary to public policy, and demoralizing to legitimate trade. All optional contracts, however, are not illegal under this statute which was read to you. If the option is to sell or purchase at a future time, then it is illegal and a wager; but if the option consists merely of a delivery within a specified time, the contract is valid, and what was done by putting up margins amounts to nothing unless the contract itself is illegal. The validity of an option contract depends upon the mutual intention of the parties thereto, and if a sale or purchase of actual wheat for future delivery is intended it is valid. If
218 the contract is lawful, the putting up of margins to cover

losses which might accrue from fluctuations in prices in final settlement of the transaction, according to the rules and usages of the board of trade of the city of Chicago, is entirely proper and legitimate. These rules have been read to you by counsel for plaintiffs, and there is nothing in those rules on their face that indicates that they are in violation of the laws of Illinois or contrary to public policy. At the same time it is well known that, no matter what may be the rules and what may be the law, parties to contracts or to other transactions, if they are so disposed, may be able to violate them, and, contrary to the spirit of the law, enter into a contract which may be in form valid, but within the statute. Courts, however, must recognize from necessity the methods of carrying on business at the present day and apply well-settled principles of the common law to enforce contracts unless they are forbidden by statute or violate some rule of public policy. The daily mercantile business of the country, mercantile deals, and by that I mean the sale and purchase of personal property, could not be successfully carried on if merchants and dealers were unable to sell something which they did not have, but which they intended to get in the market and buy before the day of delivery. A trader has a right to sell, to deliver at some future time, that which he then has not, but which he expects to go into the market and buy, and the parties may agree mutually that there need not be a present delivery, but that such delivery may take place at some other time. Such future-delivery contracts, however, must be in good faith; there must be an intention to make an actual sale and delivery of the article dealt in. If they are merely fictitious, if the parties have no intention to make an actual sale and delivery, but the intent is to settle the contract at its expiration merely by paying the difference between the contract and the market price, then it is a mere wager upon expected fluctuations in prices and is illegal.

219 The issues here presented in this case render it necessary for you to determine what was this contract. What was the character of this transaction entered into between the parties? If you should determine from the evidence that there was to be no delivery under the contracts which have been testified to, and that the memoranda offered in evidence in the shape of these trading cards, as they have been called, and the contracts for sale and purchase of wheat were fictitious and merely colorable, and made and executed as a cover for speculation in margins, and in case the price of wheat fell or rose in the market merely the difference was to be paid, and that that was the intention of both parties, then the contracts are in their nature wagers and illegal.

In that case the contract required no offer to perform nor was an ability to perform contemplated in order to entitle the party claiming the breach of the contract to the difference.

The theory of the defendant is that these transactions between the plaintiffs and himself were wagers. He insists that the arrangement which was made, as far as his intention was concerned, with the plaintiffs was merely betting upon the future price of wheat, and he claims that the testimony of the contracts themselves, and

the reports which were rendered him, and the correspondence show that such was the intention of the plaintiffs, and that both parties knew and understood that these transactions were mere wagers, and that no wheat was to be delivered or received.

The theory of the plaintiffs is that they were brokers and agents appointed by the defendant to transact business in good faith for the purchase and sale of wheat for future delivery, and that they did so, and that all these little memoranda of the transactions at
220 various times upon the chamber of commerce between these plaintiffs and other parties, members of that chamber, as evidenced by these papers offered in evidence attached to the depositions, were contracts for the actual delivery of wheat, and they were sales and purchases of wheat for future delivery.

If you believe that the plaintiffs were employed by the defendant as brokers to buy and sell wheat, and the contracts and memoranda which have been offered in evidence were upon their face contracts for the sale and purchase of wheat for future delivery, and the plaintiffs conducted this business for defendant's account and at his request advanced money on said contracts, which is this indebtedness sued for, then the burden of proof is upon the defendant to show by a preponderance of evidence to your satisfaction that these contracts were wagers; but if you believe the theory of the defence, which is that it was a gambling operation, and that all this money which is claimed to have been advanced for a legitimate purpose was advanced for a speculation in margins, and a gambling transaction, which was known to both parties, then, of course, the courts will not aid the plaintiffs in the recovery of advances for money which they knew was furnished for gambling transactions, and in that case your verdict would be for the defendant—that is, if you should determine the arrangement or understanding between the parties to the contracts was a gambling transaction, as I have stated to you, and the money was advanced by plaintiffs to enable the defendant to engage in such illegal transactions and the plaintiffs and defendant had in view a mere wagering contract upon the price of wheat, and the advances which the plaintiffs made were paid out in contracts which, between the plaintiffs and those with whom they dealt, were mere bets upon the market price of wheat in the future, no delivery having been made or contemplated, then the plaintiffs cannot recover, and your verdict should be for the defendant. In such a case plaintiffs knowingly furnished
221 the means for an illegal transaction and one prohibited by the statutes of Illinois, and the advances they made were in settlement of losses made under illegal contracts, and they cannot recover for such advances.

On the other hand, if you believe the evidence shows that the plaintiffs, acting as the defendant's brokers in the sale and purchase of wheat, entered into *bona fide* contracts for the actual sale and delivery of wheat with third parties at his request, and subsequently settled losses and paid the amounts due under the contracts, then they are entitled to a verdict and to recover the same for this money paid out at his request.

So if you find from the evidence that the plaintiffs were brokers or commission merchants in the city of Chicago and members of the chamber of commerce in that city, and that at various times from August, 1888, up to June, 1889, they received orders from the defendant to buy or sell wheat; and, further, if you find from the evidence that the plaintiffs, acting in good faith and in the belief that the defendant was sending said orders in good faith, made actual purchases and sales for said defendant at his request, as ordered, and in such transactions laid out and expended money for the defendant for the purpose of such actual delivery, then the plaintiffs are entitled to recover the amounts thus paid, laid out, and expended for the defendant, and their commission.

If you find that the plaintiffs were commission merchants of said city of Chicago and members of the board of trade in that city, and they acted as the brokers of the defendant, and at defendant's request and from time to time during the period in evidence here made in good faith the contracts read in evidence on the orders of the defendant, and that said contracts intended the actual delivery of wheat therein mentioned, and in settlement of the said con-
222 tracts plaintiffs paid, laid out, and expended money for defendant, they can recover in this action; and if you believe from thee vidence that these plaintiffs, acting as the agents of the defendant, entered into these contracts evidenced by these memoranda, and they were contracts for the purchase and sale of wheat, then such contracts cannot be rendered illegal by the mere intention of the defendant alone that he did not intend to deliver or receive the property. To make such contracts read in evidence void as a wagering or gambling contract each party to the contract must have designed and intended at the time the contract was entered into not to buy to receive the property, but to settle their mere differences between the contract price and the market price.

And if you should find that the defendant intended to gamble in wheat and at no time to deliver or receive the property and pay for it, and if you also find that the plaintiffs were ignorant of such intention on the part of the defendant and they received these orders of the defendant to buy and sell in good faith and in doing so incurred obligations for said defendant by said contracts, and the contracts intended the actual delivery of wheat, and plaintiffs paid money upon these contracts to adjust them for defendant, then they are entitled to recover a verdict in this action.

On the other hand, I would say to you that these memoranda which have been offered in evidence and the entries on the plaintiffs' books of these contracts are not conclusive evidence of their character. You are to determine what these contracts were; you are to determine them from the evidence in the case; you can look into the transactions themselves as disclosed by the evidence and determine from the facts and circumstances attending their making and the conduct of the parties thereto with reference to them whether they are illegal within the rule laid down or whether they are *bona fide* contracts for the purchase and sale of wheat to
223 be delivered at a future time. I might say to you here that

if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the board of trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is not evidence of their illegality. The mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take, and deliver the actual wheat at the time specified when the contracts were made.

I have been presented with a great many requests on the part of the plaintiffs and one on the part of the defendant.

(Counsel for plaintiffs state that their requests have been given in substance by the court, and that they desire to withdraw the same.)

I have virtually given the request presented by the defendant, but I will give it in his language, accompanied by some statement which I will make with reference to it.

If you should believe that it was the intention of both parties to this contract that no actual wheat was sold or delivered or intended to be delivered at a future time, and if you should find from the evidence that it was not the intention of either party that a contract should be made by plaintiffs to buy and hold wheat for delivery to the defendant, but that it was the real intention and the understanding of the parties that a contract should be made which should be closed at a future date, not by the delivery of the wheat and the payment of the purchase price, but by the payment of money to one party or the other, the parties to receive the same and the amount to be paid to be determined upon a basis of the difference between the agreed purchase price at the time the purchases were made and the actual market value of the wheat on the day when the contracts were closed, then the jury are instructed that such contracts are illegal in law and void, and you will
224 find for the defendant. I have virtually charged that, but I have put it in the form stated by the defendant.

As I stated before, all the facts in the case have been presented fairly, and I hope you will be able to arrive at a verdict and conclusion. Litigation in this court is expensive where parties or their witnesses are brought from a distance from different States, and I trust you will be able to end this controversy. It can be done by recollecting that there is an underlying question upon which the result depends, and that is the character of the transactions which were entered into, which are the basis of this controversy.

On the question of amount there *is* some seventeen thousand dollars odd claimed to be due the plaintiffs and some six hundred dollars for commissions. The pleadings in the case show the amount claimed to be due. If the contracts are not wagering contracts, as far as the amount that is actually due is concerned, it would depend upon whether you determine that there was a ratification of an act which was done by the plaintiffs claimed to have been done without any order from the defendant. I have stated to you the law which will govern you in regard to the settlement of

that question. The defendant, giving his own testimony, testifies as to no order having been made by him. The plaintiffs have introduced facts and circumstances tending to show that that order was given, and, in addition to that, they have introduced the testimony of witnesses who testify as to an admission on the part of the defendant that the account was a correct account, and also that the account rendered was put in his hands in the neighborhood of the 29th of April or thereabouts, and a letter was written, in which he was informed of the change; that no reply was made by him; that an account was rendered of the transaction; that he retained the account, and had correspondence with the plaintiffs afterwards in regard to some other matters without mentioning or raising
225 any objection to it, and that he gave no reply to the information contained in that letter. If you find from the evidence all these facts, you are to say whether it did or did not amount to a ratification. If the facts are true, then there is a ratification. I think you understand it.

Counsel for defendant draws the attention of the court to the fact that there was testimony to the effect that the final account of June 8th, as to the portion of it, might not have passed the clearing-house, and therefore was not paid by the plaintiffs.

The COURT: With regard to the amount, I would say, if it appears from the evidence that the plaintiffs had not paid out all this money, that part of the claim was not paid, but was a mere obligation to pay, and has not been paid, or that no money has been paid out by the plaintiffs, but there was a mere obligation to pay, of course they cannot recover for what they have not paid out. The claim is made that the plaintiffs have not paid this money. If it appears from the evidence that they have not paid any portion of it, or that they have paid part and have not paid the balance, of course they cannot recover for any moneys that they have not paid out.

The counsel for the defendant duly excepted to all that part and portion of said charge contained and expressed in the following words of said charge, to wit: "The time during which these transactions occurred commenced in August, 1888, and were concluded and the whole transaction finally closed up in June, 1889. The plaintiffs claim that the defendant applied to the Minneapolis office to employ them to sell and purchase wheat for future delivery; that he inquired of the manager the commission to be charged and was informed of the rate, and also told by the manager in charge that it was a good time to make some scalps, but what that term means has not been developed by the testimony." The witness Hansen, in his testimony given on the trial of said action, developed
226 and stated the meaning of the word "scalp," and said statement or charge by the court here excepted to was error and denial of the actual testimony introduced on the part of the defendant on the trial of said action and material to his defense.

The counsel for the defendant also duly excepted to all that other and further part and portion of said charge contained, stated, or expressed in the following words of said charge, to wit: "It is

claimed on the part of the plaintiffs that he was informed of the rate of commission for their services; that the contracts made for him would be subject to the rules, usages, and regulations of the chamber of commerce of the city of Chicago, and that in all cases actual wheat must be purchased and sold and the margins kept up to protect them against loss," on the ground that there is nothing in the pleadings, evidence, or testimony introduced on trial or in the record in this action stating, supporting, or going to show any claim on the part of the plaintiff- that "actual wheat must be purchased and sold" or was to be purchased or sold in any agreement or dealing between the plaintiff- or defendant on which this action is brought or founded or in any way connected therewith, and the part of said charge here excepted to is injurious and prejudicial to the defendant and misleading and misdirecting to the jury and error both in law and fact.

The defendant's counsel also duly excepted to all that further part and portion of said charge contained, stated, or expressed in the following words of said charge, to wit: "Now, if you find from the evidence that the plaintiffs about April 29, 1889, informed the defendant by letter that the forty thousand bushels of May wheat in question could be at that time changed to June wheat, and that the defendant made no answer thereto; and if you further believe
227 from the evidence that said May wheat was changed over into June for and on account of the defendant, and that the plaintiffs rendered an account, a report and statement, to defendant that said change had been made, and the defendant received such report and statement and retained it and made no objections to said change of said May wheat to June, then such facts amount to and were a ratification on the part of defendant of the acts of the plaintiffs in making such change," on the ground that the evidence in the case did not justify the finding by the jury that "said May wheat was changed over into June wheat for and on account of the defendant," and on the further ground that the statement and form of the part of said charge here excepted to is prejudicial to the defendant, and for error in law.

The defendant's counsel also duly excepted to all that further portion of said charge contained, stated, or expressed in the following words of said charge, to wit: "The plaintiffs' theory is, and evidence has been introduced tending to sustain it, that they were employed by defendant through the Minneapolis office as brokers and commission merchants to purchase or sell wheat for future delivery on his account, and that such sales and purchases were to be made on the Chicago board of trade with the members thereof; that such contracts were to be governed by the rules and usages of such chamber of commerce, and that in every instance actual delivery of wheat was intended by the parties to the contracts made for the defendant's account, and that these contracts were closed and settled up by the plaintiffs in accordance with these terms and at the defendant's request, and advances were made and their own money paid out for his benefit," on the ground that there is nothing in the pleadings, evidence, or record to justify such theory (on the

part of the plaintiff-); that the portion of the charge here excepted to is prejudicial to the defendant, tends to mislead the jury, and is error in the charge and error in law on the whole evidence in the case.

228 The defendant's counsel also duly excepted to all that further portion of said charge contained, stated, or expressed in the following words of said charge, to wit: "All optional contracts, however, are not illegal under the statute which was read to you. If the option is to sell or purchase at a future time, then it is illegal and a wager; but if the option consists merely of a delivery within a specified time, the contract is valid, and what was done by putting up margins amounts to nothing unless the contract itself is illegal. The validity of an option contract depends upon the mutual intention of the parties thereto, and if a sale or purchase of actual wheat for future delivery is intended, it is valid. If the contract is lawful the putting up of margins to cover losses which might accrue from fluctuations in prices in final settlement of the transactions, according to the rules and usages of the board of trade of the city of Chicago, is entirely proper and legitimate. These rules have been read to you by counsel for plaintiffs, and there is nothing in those rules on their face that indicates that they are in violation of the laws of Illinois or contrary to public policy," on the ground that the putting up of margins when the market price fell below the purchase price, and the receiving of margins or to receive and realize margins from the seller when the market price went above the selling price was proper evidence to go to the jury and to be considered by them in determining the character of the deals and transactions between the plaintiffs and the defendant in controversy in this action and of the intention of both the plaintiffs and defendant in entering into and carrying on the same; that the portion of the charge here excepted to is prejudicial to the defendant, tends to mislead the jury, and is error in the charge and error in law on the whole evidence in the case.

229 The defendant's counsel also duly excepted to all that portion of said charge contained, stated, or expressed in the following words of said charge, to wit: "Courts, however, must recognize from necessity the methods of carrying on business at the present day, and apply well-settled principles of the common law to enforce contracts, unless they are forbidden by statute or violate some rule of public policy. The daily mercantile business of the country, mercantile deals, and by that I mean the sale and purchase of personal property, could not be successfully carried on if merchants and dealers were unable to sell something which they did not have, but which they intended to get in the market and buy before the day of delivery. A trader has a right to sell, to deliver at some future time, that which he then has not, but which he expects to go into the market and buy, and the parties may agree mutually that there need not be a present delivery, but that such delivery may take place at some other time. Such future-delivery contracts, however, must be in good faith; there must be an intention to make an actual sale and delivery of the article dealt in," on

the ground that the portion of the charge here excepted to is prejudicial to the defendant, misleads the jury, is error in the charge and error in law on all the evidence in the case.

The defendant's counsel also duly excepted to all that portion of said charge contained, stated, or expressed in the following words of said charge, to wit: "The theory of the plaintiffs is that they were brokers and agents, appointed by the defendant to transact business in good faith for the purchase and sale of wheat for future delivery, and that they did so, and that all these little memoranda of the transactions at various times upon the chamber of commerce between these plaintiffs and other parties, members of that chamber, as evidenced by these papers offered in evidence attached to the depositions, were contracts for the actual delivery of wheat, and they were sales and purchases of wheat for future delivery.

230 If you believe that the plaintiffs were employed by the defendants as brokers to buy and sell wheat, and the contracts and memoranda which have been offered in evidence were, upon their face, contracts for the sale and purchase of wheat for future delivery, and the plaintiffs conducted this business for defendant's account, and at his request advanced money on said contracts, which is this indebtedness sued for, then the burden of proof is upon the defendant to show by a preponderance of evidence, to your satisfaction, that these contracts were wagers," on the ground that there is nothing in the pleadings, evidence, or record in this action to support or justify the theory of the plaintiffs stated by the court in this part of its charge here excepted to; that the portion of said charge here excepted — is prejudicial to the defendant and is misleading to the jury, is error in the charge and error in law on all the evidence and facts in the case.

The defendant's counsel also duly excepted to all that further portion of said charge and each specification and sentence thereof contained, stated, or expressed in the following words of said charge, to wit: "On the other hand, if you believe the evidence shows that the plaintiffs, acting as the defendant's brokers in the sale and purchase of wheat, entered into *bona fide* contracts for the actual sale and delivery of wheat with third parties at his request, and subsequently settled losses and paid the amounts due under the contracts, then they are entitled to a verdict, and to recover the same for this money paid out at his request.

"So if you find from the evidence that the plaintiffs were brokers or commission merchants in the city of Chicago and members of the chamber of commerce of that city, and that at various times from August, 1888, up to June, 1889, they received orders from the defendant to buy or sell wheat; and, further, it you find from

231 the evidence that the plaintiffs, acting in good faith and in the belief that the defendant was sending said orders in good faith, made actual purchase- and sales for said defendant at his request, as ordered, and in such transactions laid out and expended money for the defendant for the purpose of such actual delivery, then the plaintiffs are entitled to recover the amounts thus paid, laid out, and expended for the defendant, and their commission.

"If you find that the plaintiffs were commission merchants of said city of Chicago and members of the board of trade in that city, and they acted as the brokers of the defendant, and at defendant's request and from time to time during the period in evidence here made in good faith the contracts read in evidence on the orders of the defendant, and that said contracts intended the actual delivery of wheat therein mentioned, and in settlement of the said contracts plaintiffs paid, laid out, and expended money for defendant, they can recover in this action; and if you believe from the evidence that these plaintiffs, acting as the agents of the defendant, entered into these contracts evidenced by these memoranda, and they were contracts for the purchase and sale of wheat, then such contracts cannot be rendered illegal by the mere intention of the defendant alone that he did not intend to deliver or receive the property. To make such contract read in evidence void as a wagering or gambling contract, each party to the contract must have designed and intended at the time the contract was entered into not to buy to receive the property, but to settle their mere differences between the contract price and the market price; and if you should find that the defendant intended to gamble in wheat and at no time to deliver or receive the property and pay for it; and if you also find that the plaintiffs were ignorant of such intention on the part of the defendant and they received these orders of the defend-
232 ant to buy and sell in good faith, and in doing so incurred obligations for said defendant by said contracts, and the contracts intended the actual delivery of wheat, and plaintiffs paid money upon these contracts to adjust them for defendant, then they are entitled to recover a verdict in this action.

"On the other hand, I would say to you that these memoranda, which have been offered in evidence and the entries on the plaintiffs' books of these contracts are not conclusive evidence of their character. You are to determine what these contracts were; you are to determine them from the evidence in the case. You can look into the transactions themselves as disclosed by the evidence and determine from the facts and circumstances attending their making and the conduct of the parties thereto with reference to them whether they are illegal within the rule laid down, or whether they are *bona fide* contracts for the purchase and sale of wheat to be delivered at a future time," on the ground of error in the portion of the charge here excepted to, and that the same is error in law on all the evidence and facts in the case, is prejudicial to the defendant, and misleading to the jury.

The defendant's counsel also duly excepted to all that further portion of said charge contained, stated, or expressed in the following words of said charge, to wit: "I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the board of trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is not evidence of their illegality. The mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity

of the contract if the original intention was to purchase, receive, take, and deliver the actual wheat at the time specified when
233 the contracts were made," on the ground that the offsets and modes of settlement stated and referred to in the part of the charge here excepted to belonged to the jury as proper and competent evidence to be considerd by them in determining the entire scope and character of said contracts and of the original and entire intentions of the plaintiffs and defendant in respect thereto, and as affecting and showing the original intention with which said contracts were made and were to be executed and closed; that said charge here excepted to characterizes said evidence as no evidence and virtually takes the same from the jury; that said charge here excepted — is prejudicial to the defendant, is misleading to the jury, and is otherwise error in law.

The defendant's counsel also duly excepted to all that portion of said charge contained, stated, or expressed in the following words of said charge, to wit: "The plaintiffs have introduced facts and circumstances tending to show that that order was given, and in addition to that they have introduced the testimony of witnesses who testify as to an admission on the part of the defendant that the account was a correct account, and also that the account rendered was put in his hands in the neighborhood of the 29th of April or thereabouts, and a letter was written in which he was informed of the change; that no reply was made by him; that an account was rendered of the transaction; that he retained the account and had correspondence with the plaintiffs afterwards in regard to some other matters, without mentioning or raising any objection to it, and that he gave no reply to the information contained in that letter. If you find from the evidence all these facts you are to say whether it did or did not amount to a ratification. If the facts are true, then there is a ratification," on the ground of error in statement of the evidence and error in law.

The jury then retired and brought in and rendered a ver-
234 dict in favor of the plaintiffs and against the defendant for the sum of nineteen thousand and ninety-nine and $\frac{50}{100}$ ($19,099.50) dollars.

And because the foregoing matters and things do not appear of record in said action, the judge who tried said cause, finding the same to be true and correct, has signed and sealed this bill of exceptions this 27th day of January, 1892, and ordered the same to be made part of the record in said action.

R. R. NELSON. [L. S.]

(Endorsed:) Bill of exceptions. Filed March 3rd, 1892. Oscar B. Hillis, clerk.

235 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 235 pages, numbered consecutively from 1 to 235, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

Seal U.S. Circuit Court, Dist. of Minnesota, Third Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 21st day of March, A. D. 1892.

OSCAR B. HILLIS, *Clerk*,
By LOUISE B. TROTT, *Deputy*.

Endorsed on cover: Case No. 15,026. Minnesota C. C. U. S. Term No., 396. Theodore Hansen, plaintiff in error, *vs.* James E. Boyd and Samuel Boyd. Filed April 22, 1892.

Supreme Court U. S.
FILED.
DEC 5 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

113

THEODORE HANSEN,
Plaintiff in Error,

vs.

JAMES E. BOYD AND SAMUEL BOYD,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHAS. E. FLANDRAU,
Counsel for Plaintiff in Error.

H. H. SMYTH PRINTING COMPANY, ST. PAUL.

235 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 235 pages, numbered consecutively from 1 to 235, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 21st day of March, A. D. 1892.

OSCAR B. HILLIS, *Clerk*,
By LOUISE B. TROTT, *Deputy*.

Endorsed on cover: Case No. 15,026. Minnesota C. C. U. S. Term No., 396. Theodore Hansen, plaintiff in error, *vs.* James E. Boyd and Samuel Boyd. Filed April 22, 1892.

Supreme Court U. S.
FILED.
DEC 5 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

113

THEODORE HANSEN,

Plaintiff in Error,

vs.

JAMES E. BOYD AND SAMUEL BOYD,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHAS. E. FLANDRAU,

Counsel for Plaintiff in Error.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

Supreme Court of the United States.

THEODORE HANSEN,

Plaintiff in Error,

vs.

JAMES E. BOYD and SAMUEL BOYD,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ABSTRACT OR STATEMENT OF THE CASE.

Before the commencement of this action, the plaintiffs (defendants in error) were brokers doing business in Chicago, State of Illinois, and had a branch office in the City of Minneapolis, State of Minnesota, where they had an agent, through whom persons in that part of the country, wishing to transact business with them at the City of Chicago, acted. The plaintiff in error, defendant in the action below, was a country retail merchant, dealing in general merchandise, doing business and residing at Benson, in Minnesota, and prior to the transactions out of which this action arose Mr. Hansen had had

deals or transactions of a similar character upon the board of trade of Chicago, which fact was well known to the agent of the Boyds at Minneapolis, as appears from the first conversation which occurred between this agent and Mr. Hansen about his making some more deals with them, and which lead up to the deals under consideration. *See fols. 85, 86, 177, 178 of Record.*

In the last part of July, or the first of August, 1888, Mr. Hansen and Charles E. Handy, the agent of the Boyds at Minneapolis, had a conversation which forms the basis of all these matters, deals and transactions involved in this action, which conversation is found in *folios 63, 85, 86, 88, 89, 177, 178.*

The plaintiff in error claims that these conversations constitute an agreement between the Boyds, through their agent Handy, and Mr. Hansen to carry out and execute for him wagering contracts on the future price of wheat on the board of trade of Chicago, which were to be settled on the fluctuations of the price of wheat in the market, and that it was not the intention of either party to buy, sell, deliver or receive any actual wheat on any of the deals that were so contemplated, and that this claim on the part of the plaintiff in error is conclusively shown by the evidence, and admitted by the defendants in error, and that there is nothing to the contrary in the record.

We further claim that the understanding or agreement entered into between the Boyds and Mr. Hansen was also for *margin deals*, so-called, which are unlawful, as being against public policy.

Under this agreement and understanding the Boyds made nineteen deals on the board of trade for Han-

sen, the character of all of which appears in the record in witness Handy's testimony on pages 33 to 39 inclusive, and defendant's exhibits *1-1 to 1-20.* All of these transactions as so shown are mere wagers, and were settled as previously agreed upon on the fluctuations of the wheat market. All of which is admitted by the parties, and stands undisputed and confessed. *See Record, fols. 60, 61 and 70.*

The consequence and result of these various transactions and deals was, as claimed by the plaintiffs below, to leave Mr. Hansen in debt to them for the sum of $18,248.36, for which they sue and ask judgment, with interest from June 8th, 1889. This sum, claimed in the complaint, is made up of two causes of action, one for $17,598.36 for moneys alleged to have been paid, laid out and expended by the plaintiffs for the defendant, and one for work, labor and services alleged to have been performed by the plaintiffs for the defendant, amounting to $650, which latter is for the commission charged by the plaintiffs for making these wager contracts for the defendant on the Chicago board of trade. The former and larger sum being for margin losses on these various deals so made by plaintiffs for defendant, which they claim they paid out to their associate brokers at the board of trade clearing house on an offset of the deals they had made for Hansen, and in which they claim the various deals had gone against Hansen, and he had lost that amount.

The defense set up to these claims of the plaintiff is that all the deals made by the plaintiffs for the defendant were wagers on the price of wheat, and void under the laws of Illinois, and against public policy.

It developed on the trial that the plaintiffs, without any authority from the defendant, had changed 40,000 bushels of May wheat to June, and sold it in June at a loss of $1,300, and had charged commissions on such unauthorized transaction. Both the losses and the commissions are included in the verdict and judgment. *See Defendant's Exhibits 1-18, 1-19, pages 38-39 of Record.*

It also developed on the trial that all the settlements made at the clearing house of these offset contracts were made between the plaintiffs as brokers, and their associate brokers, under the rules of the board of trade, and conferred no advantage upon the defendant Hansen, and left him indebted on any deal he had made in which he had lost, exactly as if no such settlement had been made. This stands proven under the rules of the board of trade which are in evidence. *See last proviso of sec. 9 of Rule XXII, on page 74, fol. 127, of the Record,* which is as follows:

> "Provided, that in case of substitution of one contract for another, or of offsets or settlements of contracts in pursuance of such rules, regulations or customs, the member or firm making the same shall be held to guaranty to his or their principal the ultimate fulfillment of the original contract made under such order, and the principal also continuing liable on such original contract, the same as though no substitution, offset or settlement were made."

This rule was evidently made to evade the decision of the Supreme Court of Illinois in the case of *Lyon & Co. v. Culbertson, Blair & Co., 83 Ill., p. 33.*

The defendant claimed on the trial that as the action was one for money paid, laid out and expended by the plaintiffs for the defendant, that the recovery must be limited to the actual amount which had been paid, laid out or expended before the commencement

of the action, and it developed on the trial that the sum of $5,706.25, which is claimed to have been lost on the sale of wheat June 8th, 1889, *being shown by Exhibit 1-18 on page 38 of the Record,* had not been paid out by plaintiffs at the time of the commencement of the action, and that at the best there was simply an obligation outstanding to pay the same at that time, but the same is included in the verdict and judgment in this case.

SPECIFICATION OF ERRORS RELIED UPON BY THE PLAINTIFF IN ERROR.

1st. The court erred in refusing to instruct the jury to find a verdict for the defendant, when so asked by defendant's counsel, at the close of the plaintiff's testimony. *See page 110, folio 175.* Which same objection is found in our first assignment of errors, *page 18, folio 48.*

2d. The court erred in admitting the testimony of the witness James E. Boyd, one of the plaintiffs, in explanation of the manner in which the transactions in controversy were conducted and carried out under and in pursuance of the rules of the board of trade of Chicago, which was excepted to by the defendant, which evidence is as follows, *page 76, folio 131, et seq.:*

"Q. I wish you would state—you have already stated that these transactions were made by you in pursuance of and under the rules of the board of trade that are now offered in evidence. I wish you would state the manner in which trades are settled, if you know, losses paid or profits collected, through the clearing-house system of the board.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled. Defendant excepts.

A. The rules of the board of trade provide *that* the way of settlement in a certain way, which is as follows: We will suppose I buy 10,000 bushels of wheat of "A" and sell it to "B" and "B" sells it back to me at a different price. According to the rules of the board of trade that settlement is made through the clearing-house and the balance is struck and one trade offsets the other. We may have 50 customers on our books and half of them may make a profit on their sales or purchases, and the other half may make a loss in the same way. If these amounts were exactly equal of course they would offset one another and there would be no difference. But if the profits of one-half of the customers exceeded the losses of the other half we would receive the balance through the clearing house, and in the same way, if the losses of part of our customers exceeded the profits made by the others, we should have to pay the clearing-house the difference, because, of course, one party might make more profit or loss than the others.

Q. Now take this matter of Mr. Hansen's and apply it to these rules and explain how it would be done; I mean through the clearing-house.

A. Suppose he made a loss on this transaction or any of them. While at the time I was paying that loss as a matter of fact I received money through the clearing-house; it would be because some other customer had made more profits than he had lost, and so the whole transactions for that day might show a gain, but his loss would have been paid through the clearing-house.

Q. Simply because all the losses were less than all the gains?

A. Yes, sir.

Q. But you would have to pay Mr. Hansen's loss all the same through the clearing house?

A. Yes, sir. We are required every day to put into the clearing-house a statement of the different trades, showing amount owing the clearing-house and amount owed us by the clearing-house.

Q. All the moneys in the various statements that have been rendered to Hansen where there was a loss you paid it to the clearing-house, and where there was a profit you received it from the clearing-house?"

3d. The court erred in admitting the testimony of the witness James E. Boyd, one of the plaintiffs, in explanation of the manner and fact in which the payment of the losses and profits occurring under the various transactions involved in this action were

made to, received from, and adjusted by the Chicago board of trade clearing-house, which was excepted to by the defendant, which testimony is as follows, *page 77, folio 132:*

"Q. All the moneys in the various statements that have been rendered to Hansen where there was a loss you paid it to the clearing-house, and where there was a profit you received it from the clearing-house?

Objected to as immaterial, incompetent and irrelevant.

Objection overruled. Defendant excepts.

A. Yes, sir. I don't speak of my own knowledge, except that very often I have signed checks to pay the clearing-house and have signed checks received from it. I can only tell from the books. I don't know any particular accounts or any particular days.

Q. State whether, in the usual course of business, every one of these transactions went through the clearing-house.

A. Yes, sir; every one of those transactions went through the clearing-house."

4th. The court erred in that part of its charge to the jury embraced in the following words, *page 146, folios 225, 226:*

"The time during which these transactions occurred commenced in August, 1888, and were concluded and the whole transaction finally closed up in June, 1889. The plaintiffs claim that the defendant applied to the Minneapolis office to employ them to sell and purchase wheat for future delivery; that he inquired of the manager the commission to be charged, and was informed of the rate, and also told by the manager in charge that it was a good time to make some scalps, but what that term means has not been developed by the testimony;"

—which was duly excepted to.

5th. The court erred in that part of its charge to the jury embraced in the following words, *pages 146-147, folio 226:*

"It is claimed on the part of the plaintiffs that he was informed of the rate of commission for their services; that the contracts made for him would be subject to the rules, usages and regulations of the

chamber of commerce of the City of Chicago, and that in all cases actual wheat must be purchased and sold and the margins kept up to protect them against loss;"

—which was duly excepted to.

6th. The court erred in that part of its charge to the jury embraced in the following words, *page 147, folios 226, 227:*

"Now, if you find from the evidence that the plaintiffs, about April 29, 1889, informed the defendant by letter that the forty thousand bushels of May wheat in question could be at that time changed to June wheat, and that the defendant made no answer thereto, and if you further believe from the evidence that said May wheat was changed over into June, for and on account of the defendant, and that the plaintiffs rendered an account—a report and statement—to the defendant that said change had been made, and the defendant received such report and statement and retained it and made no objections to said change of said May wheat to June, then such facts amount to and were a ratification on the part of defendant of the acts of the plaintiffs in making such change;"

—which was duly excepted to.

7th. The court erred in that part of its charge to the jury embraced in the following words, *page 147, folio 227:*

"The plaintiffs' theory is, and evidence has been introduced tending to sustain it, that they were employed by defendant, through the Minneapolis office, as brokers and commission merchants, to purchase or sell wheat, for future delivery, on his account, and that such sales and purchases were to be made on the Chicago board of trade with the members thereof; that such contracts were to be governed by the rules and usages of such chamber of commerce, and that in every instance actual delivery of wheat was intended by the parties to the contracts made for the defendant's account, and that these contracts were closed and settled up by the plaintiffs in accordance with these terms and at the defendant's request, and advances were made and their own money paid out for his benefit;"

—which was duly excepted to.

8th. The court erred in that part of its charge to the jury embraced in the following words, *page 148, folio 228:*

"All optional contracts, however, are not illegal under the statute which was read to you. If the option is to sell or purchase at a future time, then it is illegal and a wager; but if the option consists merely of a delivery within a specified time, the contract is valid, and what was done by putting up margins amounts to nothing unless the contract itself is illegal. The validity of an option contract depends upon the mutual intention of the parties thereto, and if a sale or purchase of actual wheat for future delivery is intended, it is valid. If the contract is lawful, the putting up of margins to cover losses which might accrue from fluctuations in prices in final settlement of the transactions, according to the rules and usages of the board of trade of the City of Chicago, is entirely proper and legitimate. These rules have been read to you by counsel for plaintiffs, and there is nothing in those rules on their face that indicates that they are in violation of the laws of Illinois or contrary to public policy;"

—which was duly excepted to.

9th. The court erred in that part of its charge to the jury embraced in the following words, *page 148, folio 229:*

"Courts, however, must recognize from necessity the methods of carrying on business at the present day, and apply well-settled principles of the common law to enforce contracts unless they are forbidden by statute or violate some rule of public policy. The daily mercantile business of the country, mercantile deals—and by that I mean the sale and purchase of personal property—could not be successfully carried on if merchants and dealers were unable to sell something which they did not have, but which they intended to get in the market and buy before the day of delivery. A trader has a right to sell, to deliver at some future time, that which he then has not, but which he expects to go into the market and buy; and the parties may agree mutually that there need not be a present delivery, but that such delivery may take place at some other time. Such future-delivery contracts, however, must be in good faith; there must be an intention to make an actual sale and delivery of the article dealt in;"

—which was duly excepted to.

10th. The court erred in that part of its charge to the jury embraced in the following words, *page 149, folios 229, 230-1-2:*

"The theory of the plaintiffs is that they were brokers and agents appointed by the defendant to transact business in good faith for the purchase and sale of wheat for future delivery, and that they did so, and that all these little memoranda of the transactions at various times upon the chamber of commerce between these plaintiffs and other parties, members of that chamber, as evidenced by these papers offered in evidence, attached to the depositions, were contracts for the actual delivery of wheat, and they were sales and purchases of wheat for future delivery.

"If you believe that the plaintiffs were employed by the defendant as brokers to buy and sell wheat, and the contracts and memoranda which have been offered in evidence were upon their face contracts for the sale and purchase of wheat for future delivery, and the plaintiffs conducted this business for defendant's account, and at his request advanced money on said contracts, which is this indebtedness sued for, then the burden of proof is upon the defendant to show, by a preponderance of evidence, to your satisfaction, that these contracts were wagers."

Also, "on the other hand, if you believe the evidence shows that the plaintiffs, acting as the defendant's brokers in the sale and purchase of wheat, entered into *bona fide* contracts for the actual sale and delivery of wheat with third parties, at his request, and subsequently settled losses and paid the amounts due under the contracts, then they are entitled to a verdict and to recover the same for this money paid out at his request.

"So, if you find from the evidence that the plaintiffs were brokers or commission merchants in the City of Chicago and members of the chamber of commerce of that city, and that at various times from August, 1888, up to June, 1889, they received orders from the defendant to buy or sell wheat; and, further, if you find from the evidence that the plaintiffs, acting in good faith and in the belief that the defendant was sending said orders in good faith, made actual purchase and sales for said defendant, at his request, as ordered, and in such transactions laid out and expended money for the defendant for the purpose of such actual delivery, then the plaintiffs are entitled to recover the amounts thus paid, laid out and expended for the defendant and their commission."

Also, "if you find that the plaintiffs were commission merchants of said City of Chicago and members of the board of trade in that

city, and they acted as brokers of the defendant, and at defendant's request, and from time to time during the period in evidence here, made in good faith the contracts read in evidence on the orders of the defendant, and that said contracts intended the actual delivery of wheat therein mentioned, and in settlement of the said contracts plaintiffs paid, laid out and expended money for defendant, they can recover in this action; and if you believe from the evidence that these plaintiffs, acting as the agents of the defendant, entered into these contracts evidenced by these memoranda, and they were contracts for the purchase and sale of wheat, then such contracts cannot be rendered illegal by the mere intention of the defendant alone that he did not intend to deliver or receive the property. To make such contract read in evidence void as a wagering or gambling contract, each party to the contract must have designed and intended at the time the contract was entered into not to buy to receive the property, but to settle their mere differences between the contract price and the market price; and if you should find that the defendant intended to gamble in wheat and at no time to deliver or receive the property and pay for it, and if you also find that the plaintiffs were ignorant of such intention on the part of the defendant, and they received these orders of the defendant to buy and sell in good faith, and in doing so incurred obligations for said defendant by said contracts, and the contracts intended the actual delivery of wheat, and plaintiffs paid money upon these contracts to adjust them for defendant, then they are entitled to recover a verdict in this action.

"On the other hand, I would say to you that these memoranda which have been offered in evidence and the entries on the plaintiff's books of these contracts, are not conclusive evidence of their character. You are to determine what these contracts were; you are to determine them from the evidence in the case; you can look into the transactions themselves as disclosed by the evidence and determine from the facts and circumstances attending their making and the conduct of the parties thereto with reference to them, whether they are illegal within the rule laid down or whether they are *bona fide* contracts for the purchase and sale of wheat to be delivered at a future time;"

—which was duly excepted to.

11th. The court erred in that part of its charge to the jury embraced in the following words, *pages 150-151, folios 232-3:*

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the board of trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is not evidence of their illegality. The mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take and deliver the actual wheat at the time specified when the contracts were made;"

—which was duly excepted to.

12th. The court erred in that part of its charge to the jury embraced in the following words, *page 151, folio 233:*

"The plaintiffs have introduced facts and circumstances tending to show that that order was given, and in addition to that they have introduced the testimony of witnesses who testify as to an admission on the part of the defendant that the account was a correct account, and also that the account rendered was put in his hands in the neighborhood of the 29th of April, or thereabouts, and a letter was written in which he was informed of the change; that no reply was made by him; that an account was rendered of the transaction; that he retained the account and had correspondence with the plaintiffs afterwards in regard to some other matters without mentioning or raising any objection to it, and that he gave no reply to the information contained in that letter. If you find from the evidence all these facts, you are to say whether it did or did not amount to a ratification. If the facts are true, then there is a ratification;"

—which was duly excepted to.

BRIEF OF DEFENDANTS IN ERROR.

ARGUMENT.

I.

Our first point and claim is this:

That the contract or agreement which was entered into between the plaintiffs and defendant, and out of which all the transactions involved in this action arose, is by its express terms, and was, understood by both parties to the same to be a wagering contract, or, more properly speaking, an agreement under which wagering contracts were to be made by the plaintiffs for the defendant, and for which services the defendant was to pay the plaintiffs a commission. And this being true, the original contract and all subsequent ones made under it were void for several reasons.

First: It was void under the statutes of Illinois, which, bearing on this subject, are as follows:

"§ 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"§ 131. All promises, notes, bills, bonds, covenants, agreements, judgments, mortgages or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for money, property or other valuable thing, won by any gaming, or playing at cards, dice, or any other game or games, or by betting on the side or hands of any person gaming, or

by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet, to any person or persons so gaming, or betting, or that shall, during such play or betting, so play or bet, shall be void or of no effect."

—being sections 130 and 131 of chapter 38 of the Revised Statutes of the State of Illinois of 1881, and which are found on *page 111 of the Record, folios 176-177.*

Second: It was also void as against public policy.

See *Lyon & Co. v. Culbertson, Blair & Co., 83 Ill. Rep. p. 33,*

—the syllabus of which case is as follows:

"3. *Contract for future delivery.*

"On a contract for the sale and delivery of grain at a future day, where the delivery and payment are to be concurrent acts, neither party can put the other in default without performing on his part, or offering to perform.

"4. A contract for the sale of wheat in store, to be delivered at a future time, which requires the parties to put up margins as security, and provides that if either party fails on notice to put up further margins according to the market price, the other may treat the contract as filled immediately, and recover the difference between the contract and market price without offering to perform on his part, or showing an ability to perform, is illegal and void, as having a pernicious tendency."

We call the attention of the court especially to the reasoning of the Illinois court in this case, as being of great force on the position we are contending for.

See authorities on margin of case.

Third: It is declared void by the decisions in many cases, both as being contrary to statutes and public policy.

Embrey v. Jemison, 131 U. S. Rep. p. 336.

This case was decided in 1888, and contains such a full discussion of the general principle contended for, and cites so many pointed cases in support of its reasoning, that we deem it entirely unnecessary to multiply authorities on so elementary a subject.

There has been a case recently decided in the Supreme Court of the State of North Dakota at the May term of 1894, that covers many of the points that we shall make in our argument in this case so exhaustively, and withal is so refreshing and plain in expression, and exhibits such profound knowledge of the law, and great intimacy with the subject, that we cannot forbear citing it. It is the case of *David Dowes, Jr. & Co. Appellants, vs. Samuel L. Glaspel, Respondent, N. W. Rep. vol. 60, No. 2, October, 1894, p. 60.* We hope the court will consider this case fully, as we deem it quite instructive on many of the positions we will assume in the course of our argument.

II.

We will now proceed to establish the invalidity of the contract between these parties, *by its own terms* and its interpretation by the parties, and the admission of counsel on the trial. As we understand that the court having submitted the question to the jury, and it having been found against the defendant, we must make out clearly that the contract, and the acts of the parties under it, was void for these reasons, and should not have been left for the jury to pass upon, but should have been so declared by the court as a matter of law.

The defendant had had deals of the character of these involved in this action, on the board of trade of Chicago, prior to his connection with the plaintiffs, and the plaintiffs through their agent Charles E. Handy, at Minneapolis, knew all about them, and that the plaintiff had been a loser in the deals. This appears from the uncontradicted evidence of the defendant at *page 112, folio 177 of the Record*, where he uses this language:

"A. As we went out of the hall he spoke to me in the hall and said he thought he knew I had had some trades a year ago, and they had roasted me pretty hard then, but he thought it was a good time to make something back this fall by making some scalps. He used the word scalps. 'Well,' I said, 'if I should decide to make any *deals* with you what commission and what *margin* do you require?' He said 'One or two cents *margin* on a bushel, and, of course, we shall expect you will always keep your deals at the market.' 'Well,' I said 'I expected to,' and that was all that was said at the time, I think."

The court will keep in mind that in this preliminary conversation the words "*scalps*," "*deals*" and "*margins*" are used by the parties, and these words have a signification that cannot be misunderstood. The plaintiff's agent also speaks of the plaintiff having been "*roasted*" on his former deals, and suggested that it is a good time to get even by making some "*scalps*." This is a nomenclature that has no reference to honest purchases, or sales of wheat or any other commodity.

Did this court ever hear of a man being "*roasted*" on a sale of actual honest wheat? On such a sale he simply delivers the goods and pockets the money. Should it be a purchase of actual wheat he buys it to grind it into flour or ship it abroad, or to put it to some similar use, and receives it and pays for it. He may lose money in either transaction, but he

does not get "*roasted*" on or by the board of trade. That only occurs when he makes a bet and loses.

Did this court ever hear of a man who had lost money in the purchase or sale of *actual* wheat, getting even by making "*scalps*" on the board of trade? Yet this is what the plaintiff's agents endeavored to induce the defendant to do.

In relation to this word "*scalps*" we particularly call the attention of the court to the charge of the judge below, on *page 140, folio 215 of the Record*, where he says:

"The plaintiffs claim that the defendant applied to the Minneapolis office to employ them to sell and purchase wheat for future delivery. That he enquired of the manager the commission to be charged, and was informed of the rate, and also told by the manager in charge that it was a good time to make some scalps, *but what that term means has not been developed by the testimony.*"

We refer to this part of the charge, at this point, for two reasons: First, to show this court that the term "*scalps*" was so used by the plaintiff's agent, and second, for future use in analyzing the charge of the court where we will show that the term "*scalp*" was clearly defined by the testimony, and that the judge mislead the jury in charging them as he did on this point, by withdrawing the evidence from the jury, or wholly annulling its force.

We again refer to the North Dakota case, as being useful in finding out the meaning of these board of trade gambling terms.

See further the testimony of the plaintiff's witness Handy, at *page 41, folios 85, 86*, where he substantially admits that he did have this conversation with the defendant about the scalps.

This conversation was the immediate predecessor

of, and inducement to, the contract that was finally entered into, and therefore is potential in its influence upon arriving at the character of the same.

III.

The agreement or understanding that the parties entered into is in words as follows; testimony of plaintiff's witness, Handy, *Record, pages 26 and 27, folio 63:*

"Mr. Hansen came to me on 'change; we had some little talk about business" [which was the preliminary talk above referred to] "and afterwards I met him in my office, room No. 1, Chamber of Commerce, in Minneapolis, and after having some little business talk, he asked me on what terms we did business, and I told him by the customer paying us ⅛ of a cent commission per bushel, and he would have to abide by the rules of the Chicago board of trade, and told him what the rules were as to the handling of grain on the board of trade, Chicago; also that he must keep his margins good at such times as trades might be against him, so as to keep us secure, and that at any time he had a profit in any trade, and closed it out, he could have it immediately.

Q. Anything further?

A. I further went on and explained what the rules of the Chicago board of trade were, and that a delivery was *contemplated* in every trade, either by the buyer or seller, which was understood by him. *That in case* wheat was delivered he must take care of it and pay the purchase price and interest on the money, etc. That was in substance the conversation."

There is no testimony in the Record that in any way conflicts with this proof of what the agreement or understanding was, and it is sustained and corroborated throughout the whole evidence.

We will now prove that this understanding does not provide for or contemplate the sale or purchase of any actual wheat, but is designed by both parties as the basis of option deals in futures, or in other

words, mere wagers on the rise and fall of the market price of wheat.

1st. As to the provision for the payment of commissions. The provision is, the defendant was to pay the plaintiffs ⅛ of a cent per bushel. This commission was an entire unapportionable commission for both buying and selling, or selling and buying as the case might be, to complete the "deal, trade or transaction," to be carried out and consummated by the plaintiffs as the defendant's brokers. That there may be no mistake upon this point, we will call your honors' attention to the following evidence of the plaintiff:

Mr. Frank W. Leagard, the bookkeeper for the plaintiffs at Chicago, says, at *page 47, folio 92 of the Record:*

"Q. Do you, from the capacity in which you were employed as bookkeeper, know what the amount of commission was on these transactions?

A. Yes, sir.

Q. How much?

A. ⅛ of a cent a bushel for buying and selling inclusive."

This witness further on, and at *page 49*, explains how the accounts of plaintiffs of these transactions were kept, and gives an example of two separate purchases of 5,000 bushels each, and 10,000 bushels sold, and then on the next, *page 50, in folio 95*, he testifies as follows:

"Q. Where do you get you commissions from?

A. Commission, ⅛ of a cent a bushel; 10,000 bushels would be $12.50."

Again this witness on *page 52* says:

"Q. And you make you commission on the amount sold and purchased?

A. Yes, sir.

Q. Then you make the balance of the account by ascertaining the difference between the price at which you bought and the price at which you sold?

A. Yes, sir; and the commission is charged to the debit side.

Q. That is the way it is done?

A. Yes, sir."

Again, on *page 53, folio 99*, this same witness testifies on the subject of the commissions as follows:

"Q. In keeping these books you have testified as to the manner in which you kept them. In fixing the commissions, do you fix your commissions always the same way?

A. Yes, sir.

Q. With the plaintiffs?

A. Yes, sir.

Q. In this whole transaction?

A. Yes, sir.

Q. From beginning to end?

A. Yes, sir."

This is again repeated by this witness on *page 54, in folios 99-100*, and again by the defendant when testifying in his own behalf on *page 119, folios 186-187*, where he shows the sale of 40,000 bushels, and the purchase of 40,000 bushels, for which in the aggregate the commissions amounted to $50, or ⅛ of a cent per bushel for buying and selling.

But what places this question of the commissions being charged on a deal, consisting of a sale and a corresponding or offset purchase, or a purchase and a corresponding or offset sale, beyond any doubt or cavil, and makes it conclusive, is the various accounts rendered by the plaintiffs to the defendant, from time to time, and embraced in *Exhibits 1-1 to 1-20*, found on *pages 33 to 39 inclusive*, an examination of which will satisfy the court that the calculation of the amount of the commissions charged is made on both purchase and sale, or *vice versa*.

Having established this feature of the agreement, or as we may say, employment of the plaintiffs to make these deals for the defendant, what is its inevitable effect? Clearly that the plaintiffs were to make no sales without corresponding purchases, and no purchases without corresponding sales, the one to offset the other; because it was alone upon such a deal that a commission could be charged, as we cannot suppose a Chicago broker to perform any kind of service gratis. And this result necessarily excludes the intention on the part of either party to the arrangement, that any actual wheat was to be delivered on either a sale or a purchase.

An honest contract for the purchase of wheat for future delivery is a single contract and needs nothing to go along with it to perfect it. And so with an honest contract for the sale of wheat for future delivery, and had this arrangement been to charge a commission on each sale or purchase separately, there might have been some pretense that the parties contemplated actual deliveries, but when they stipulated in advance that there shall only be a commission charged on both purchase and offset or covering sale, and *vice versa*, all possible chance to claim honest sales or purchases vanishes, and the whole arrangement resolves itself into an agreement or employment, not to make honest sales or purchases, but mere bets to be decided by the fluctuations of the market, or what is established by the evidence in this case to mean a "*deal*," in the language of gamblers on the Chicago board of trade.

Not to take up too much time in the quotation of evidence, we call your honors' attention to what was called and considered as a "deal" by the parties,

in the evidence on *pages 29-30, folio 67*, where Mr. Handy explains it as follows:

"A. Yes, sir; that is right, he purchased August 10th and 14th 5,000 bushels.

Q. Amounting in the aggregate to?

A. 10,000 bushels bought.

Q. And the same report shows sold how many bushels?

A. 10,000 bushels August 24th at 95⅞.

Q. That closed that purchase and *deal*, didn't it?

A. Yes, sir; that closed that deal."

To the same effect and by the same witness, see *page 31, folio 68:*

"Q. What I want to get at particularly is that this deal was closed August 24th, and there was the sum of $687.50 carried to his credit?

A. Yes, sir.

Q. As the amount of money to which he was entitled on that transaction?

A. Yes, sir.

Q. And this is part of that general account?

A. Yes, sir.

Q. Did I understand you to say you made that $687.50 from the difference between the contract price and the market price at the time the deal was closed?

A. The difference between the prices there stated. The difference between 5,000 bushels of wheat at 89⅛, and 5,000 at 88⅝, and 10,000 bushels at 95⅞ will make that credit.

Q. In closing that deal it was supposed that the purchase of 10,000 bushels was covered by that sale of 10,000 bushels, and so you called that deal closed?

A. Yes, sir; I presume so, certainly.

Q. And this was all done under the orders of Mr. Hansen?

A. Yes, sir.

Q. *And according to your agreement with him?*

A. *Yes.*"

See also folios 69-70, testimony of same witness.

And this method of conducting the deals under the agreement is repeatedly stated in the evidence, and is admitted to be the case by the plaintiffs' counsel. We call the special attention of the court to the

testimony of the plaintiffs' bookkeeper, Mr. Teagard, from the middle of *folio 95* to near the end of *folio 97*, on *pages 50 and 51*.

Also the admission of counsel for the plaintiffs *at the bottom of page 32*, where he says:

"Mr. Kirkton: We will admit that the witness will make the same statement as to each of the reports, and that as he has so defined one, he will so define all."

So the court will see at a glance, from what is already shown, that a "*deal*" in the understanding of these parties meant a sale, and a purchase to offset and cover it, or *vice versa*, and had no reference whatever to an honest sale or purchase of actual wheat, and that commissions were only charged on "*deals*."

Margins.

We will now call the attention of the court to the second feature in the agreement or understanding under consideration, which is as follows, *page 27, folio 63:*

"Also that he (the defendant) must keep his *margins good*, at such times as the trades might go against him, so as to keep us (the plaintiffs) secured."

The understanding and agreement here is that the defendant should place and keep good in the hands of the plaintiffs money equal in amount to the decline or rise, as the case might be, in the market price of wheat pending each *deal*, when such decline or rise should be against the defendant's trade, and would make a loss, and should do this to secure the plaintiffs from loss on their part.

This provision assumes, requires, admits and intends the fact of a continuing relation on the part of the

plaintiffs to these trades from the first purchase or sale for future delivery, and a continuing exposure and liability to loss by reason of that relation, so long as the purchase or sale for future delivery was outstanding, and until it was closed by a counter purchase or sale of an equal amount for offset, and the *deal* thus consummated.

To prove that this was the interpretation placed upon this feature of the agreement by the parties themselves, we have but to refer to *Exhibits 1-1 to 1-20, on pages 33 to 39, inclusive*, which show that there were only four "deals, trades or transactions;" where the first act or thing done was a sale; where the defendant was "short." These are *Exhibits 1-2, 1-4, 1-7, 1-11.* All the rest of them are where the defendant had purchased, and was in the parlance of the board of trade gamblers "long," and it was on these *long deals* that the defendant made his losses, not because the defendant refused to receive and pay for actual wheat when tendered or delivered, but because the market had fallen and was against the defendant's bets.

This feature emphasizes the fact that there were no trades or transactions intended by the parties to the contract, except "deals," such as were composed of a sale and a purchase, or a purchase and a sale, the one to settle the other through the difference in the market price without the intervention of actual wheat in any case.

This feature of the contract fixes its character as a wagering contract, and also brings it within the doctrine of the case of *Lyon & Co. vs. Calbertson, Blain & Co., 83 Ill. p. 33,* above cited, and makes the contract "illegal and void, as having a pernicious ten-

dency," which position will be more fully explained hereafter.

IV.

We now call attention to another and further provision of the agreement, as to profits, *page 27, folio 63.* It is as follows:

"And that at any time he (the defendant) had a profit in any trade *and closed it out*, he could have it *immediately*."

What has already been said of the provision of the agreement relating to margins is pertinent to this provision, carries the relation and intention of the plaintiffs and defendant to the final consummation of each "trade or deal" in a profit or *winning in money*, or a *loss in money*, to the defendant, and necessarily excludes and precludes the idea of any separate contract for either the sale or purchase of wheat, and therefore equally negatives the idea of any actual delivery of wheat.

V.

The last clause in this agreement to which we propose to call attention is as follows, *page 27, folio 63:*

"And that a delivery was *contemplated* in every trade by the buyer or seller, which was understood by him" (the defendant). "That *in case* wheat was delivered, he (the defendant) was to take care of it, and pay the purchase price, and interest on the money, &c."

If these people had any honest purpose of buying and selling actual wheat, what was the use of saying anything about delivering it? On an honest purchase or sale, delivery of the article purchased or

sold goes without saying, and the very fact that the plaintiffs' agent inserted this clause, proves to any impartial and intelligent mind that it was designed to accomplish an evasion of the law, and especially is this so when the rest of the contract precludes the idea of a delivery in any case. And not only is this so, but the very language of this provision shows that the delivery of actual wheat is only *contemplated as a contingency*,—a thing not intended, but a casualty, a thing that was possible and might happen in making the "trades and deals," and provision is made to protect the plaintiffs in case it should arise or happen. "The *Broker* doth protest too much, methinks."

This contingency or casualty was not of the intention of the plaintiffs, or of either of the parties, but was external and foreign to their intention, their intention being to merely make bets on the fluctuations in the market price of wheat, and settle by covering contracts without a delivery in any case; and this provision, taken from the rules of the board of trade, was inserted simply to evade the prohibitory clause in the statutes of Illinois, and to give the contracts they designed to make the color of legitimacy.

When we take this clause in the agreement and consider it in connection with the other parts of the agreement and the acts and admissions of the parties under the agreement, it can receive no other construction than the one we place upon it. It is necessarily incompatible with any actual delivery of wheat, because it assumes that as a *usual* thing, actual wheat was not to be delivered, but that in a possible contingency it *might* be. The offset deal,

which was evidently the sole object of the agreement between the parties, and the sale and delivery of actual wheat, cannot stand together in the same act, nor in the same intention.

The defendants in error will probable invoke the rules of the board of trade to show that all contracts made by the plaintiffs for the defendant required actual deliveries, and that in consequence such contracts were valid in the law. The answer to such a claim is, that if our construction of the agreement made between the plaintiffs and defendant, interpreted by their own acts and in their own language, is sound, as we have already presented it, then the plaintiffs had no authority at all to make a valid contract for the defendant, but were only authorized to make wagering contracts for him, and it therefore becomes entirely immaterial whether they make valid contracts on the board of trade or not. If valid, they do not bind the defendant, because he gave them no authority to make any such contracts for him, and they cannot recover for payments made or commissions earned by them for him on such unauthorized contracts; and if they were wagering contracts, as we claim they were, the plaintiffs certainly cannot recover for any payments they made on them, or any commissions they claim to have earned by reason of their services in making them.

This position is fully established in the case of *Dows, et al., vs. Glaspel, decided by the Supreme Court of North Dakota*, and already cited, and the numerous authorities referred to in that case.

We want to impress upon the court that no matter what rules the board of trade may make as to actual

deliveries of grain in all cases, and no matter how strongly the members of that board may entrench themselves behind such rules in the contracts they may make with their customers, by inserting (as in the present case) "that a delivery is always contemplated," it will all be of no avail if the whole transaction discloses an intention to simply go on the board and make wagers on the fluctuations in the price of wheat. The laws of Illinois, and the laws that direct public policy cannot be overthrown or circumvented by any such gambling tricks, and the courts will declare all such contracts and transactions void. *See Embrey vs. Jemison*, above cited, where this court in its opinion uses this language, *page 334:*

> "The mere form of the transaction is of little consequence. If it were, the statute against wagers could be easily evaded. The essential inquiry in every case is as to the necessary effect of the contract, and the real intention of the parties."

And again, on *page 345*, this language is used:

> "It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade."

In reference to the rules of the board of trade which were allowed in evidence, and which are found on *pages 66 to 76 inclusive*, we desire to say: that the bulk of them have no bearing whatever on the questions involved in this case, and those that have any relation to them for the most part simply regulate the methods of the conduct of the members of the board in the transaction of their business. Therefore, with the exception of the *ninth section of rule 22, found on pages 73 and 74*, above referred to, we will make no further allusion to them unless

it may become necessary in the discussion of our exceptions to the charge of the court.

VI.

Heretofore our argument has been confined to an exposition of the express agreement made between the parties, and we feel quite confident that we have shown it to have been made by the parties for an illegal purpose, and carried out by them exactly according to such purpose and intention; but we desire to call your honors' attention to another feature of this controversy, and we know of no better way of presenting it than by quoting from the opinion of this court in *Embrey vs. Jemison, at page 345*, where this language is used:

> "Referring to the decision in *Roundtree vs. Smith, 108 U. S. 269*, it was further said: 'It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and in such case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful designs of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered, or losses incurred by himself on behalf of either in forwarding the transaction.'"

The facts in *Embrey vs. Jemison* are exactly similar to those in the case at bar, except one was betting on cotton and the other on wheat.

One more quotation on this point from the North Dakota case, *Dows, et al., vs. Glaspel*, found in the opinion at *page 62, N. W. Rep., vol. 60, Oct. 13, 1894*, and we think we have said enough to convince any court:

"Illegality is seldom guilty of the consummate folly of flaunting its defiance of law in the face of public sentiment—of furnishing itself the evidence of its violation of law. To escape the penalties of breaking the law, it will always put on 'the suits and trappings' of honest transactions. Mere wagering contracts invariably wear the garb of *bona fide* sales. This is common knowledge. Myriads of gambling operations are daily arranged by two interested brokers, who fatten on the folly of their dupes, in the decent and decorous habiliments of lawful business transactions.

"The naivete of a tribunal which in such cases should unquestioningly take the semblance for the substance would indeed be pitiable if it did not excite derision and contempt."

The Dakota court which expresses itself so forcibly had only the inference resulting from the transactions to act upon, while in the case at bar the parties were "guilty of the consummate folly" of making an express agreement to violate the law as we have so clearly shown above.

There cannot be any doubt that from the evidence above referred to and the authorities cited, the plaintiffs had such guilty knowledge, and acted pursuant to it in all they did for the defendant, and were *particeps criminis*.

If the plaintiffs had this guilty knowledge, then it is entirely immaterial whether the brokers on the board of trade with whom they dealt were innocent or not. Their guilty knowledge precludes their recovery for advances or commissions.

McCormick vs. Nichols, 19 Ill. App. 334 to 337.
Beveridge vs. Hewitt, 8 Ill. App. 467, 482, 483.
Miles vs. Andrews, 40 Ill. App. 155, 163, 164.
Coffman vs. Young, 20 Ill. App. 82.

We will close the argument as to the illegal character of the agreement by stating that as the same appears in evidence, it is on the proof and admissions

of the plaintiffs themselves, without any conflict from the defendant, and there is, and can be, no doubt about its terms or the intention of the parties to it, because this intention is doubly established by the acts of the parties under it, all of which were in exact accordance with the design we claim, and all were wagering contracts. The case is free from all doubt about what the agreement was, and if we are sound on our construction of it, then it was the duty of the court to have taken the consideration of it from the jury, and to have instructed them to find for the defendant, when it was requested so to do by defendant's counsel at the end of the plaintiffs' case. (*See page 110, folio 175.*) If this was the agreement under which the transactions we are considering were had, then nothing subsequently appearing in the case could infuse validity into it, and it continued to be an illegal agreement all the way through to the end, and no recovery could, under any circumstances, be predicated upon it; and it was equally the duty of the court, at the close of the testimony, whether asked or not, to instruct the jury to find for the defendant, and it was error in the court to leave to the jury any matter concerning the agreement or the facts growing out of the same, as these matters all rested on the testimony, admissions and confessions of the plaintiffs themselves, and were undisputed.

This position appears so clear and convincing to us, that if the case was presented to this court by the evidence alone, without an assignment of errors as required by the statute, or a specification of errors as required by rule 21 of this court, or without a single exception taken on the trial, it would fall

clearly within the clause of section 4 of rule 21, which says: "but the court, at its option, may notice a plain error not assigned or specified."

We, of course, do not admit that all our points are not fully covered by proper exceptions, but we take this position in anticipation of some point that may be urged by the defendants in error that we are deficient in this regard. In other words, when it appears clearly to the court that the parties deliberately entered into, and acted under, an illegal contract, it will decline to help them out of any difficulty into which they may have led themselves, and will never allow a recovery of one against the other on a mere technicality. Even if the preceding argument should not have proper and sufficient exceptions upon which to stand, then it is all revived and made pertinent, upon the exceptions we take to the charge of the court, which later exceptions cover the whole case, and involve and entitle us to be heard upon, all the foregoing matters.

VII.

The court must not lose sight of the fact that this suit is brought for money paid, laid out and expended by the plaintiffs for the defendant, and for work, labor and services performed by plaintiffs for defendant, and the count on each cause of action is distinct and separate as to the sums claimed, so they can stand or fall each upon its own merits. The first cause for money paid out and expended is purely and alone for advances alleged to have been made to make good the losses which befell the defendant on his deals made on the board of trade, and it

appears from the testimony of the plaintiffs entirely uncontradicted, that such payments were made through settlements of the differences by the offsets on deals arising from fluctuations in the market price of wheat, and were all made through the clearing-house of the Chicago board of trade, and were entirely distinct from, and disconnected with, any settlements that were to be made between Hansen and the plaintiffs. In other words, Mr. Hansen had nothing to do whatever with the clearing-house, and knew nothing about it. The court will see that the relation of Hansen to the plaintiffs was only as to deals which were terminated on a contract and an offset contract, which declared whether Hansen had won or lost, and if he had won, he could get his winnings immediately on the deal being completed, and if he lost, his margins were supposed to be in the hands of the plaintiffs for them to pay the losses with, the clearing-house operations being a matter solely between the brokers in which he had no interest.

See the testimony of James E. Boyd, one of the plaintiffs, at *pages 91 and 92, beginning at bottom of folio 150,* as follows:

"Q. In respect to this transaction being closed up, as between you and Mr. Hansen they are closed up at the time those statements are rendered? (Referring to Exhibits 1-1 to 1-20.)

A. Yes, sir.

Q. And if there is any balance due Mr. Hansen from your house, he can come there at that time and get it?

A. Yes, sir; he can have his check in twenty minutes.

Q. But between you and these brokers with whom these transactions were made they continue open after settlement with Mr. Hansen, and you assume the liability of the failure of any broker he might have sold to?

A. Yes, sir."

And further on, in *folio 151*, this witness states and explains this clearing-house business as follows:

"Q. You mean it had not been settled at that time?

A. I mean it had not been offset. We sold on the 29th, and the transaction went to the clearing-house, but it might not have been settled through the clearing-house until after this suit was commenced.

Q. But between you and Hansen it was settled?

A. Yes, sir.

Q. Whatever liability you assumed to perform that contract he had nothing to do with it?

A. No, sir."

This clearly shows that the deals between Hansen and the plaintiffs ended with the ascertainment of the losses or gains on the various deals made for Hansen by the plaintiffs on the board of trade by the purchases or sales for offsets, and that the clearing-house settlements were matters entirely between brokers exclusively, involving numerous deals between many parties, and striking a balance between gains and losses as to all of them. If Hansen made a loss on any deal, he made it when the deal was settled between him and his brokers, and they could take it out of the margins he had or ought to have had in their hands, and the clearing-house operation did not change in any way his obligation to his brokers. If the brokers paid out any money on the clearing-house settlement it was for themselves and not for Hansen. If Hansen had put up his margins as he agreed to do, the plaintiffs would have had Hansen's money in their hands to meet their losses through the clearing-house, and then there would have been no claim against him for money paid out for him; but as he had failed to put up his

margins as he had agreed, his brokers were bound to pay *their—not Hansen's*—balances at the clearing-house, and they had a cause of action possibly, had the transaction been valid, against Hansen for damages for a breach of his contract to put up margins, but not for money paid out for him, because they paid it out for themselves. Hansen was neither party nor privy to the clearing-house settlements. He did not request them, and had nothing at all to do with them.

In support of this position we cite the testimony of Charles E. Handy, one of plaintiffs' witnesses, from about the middle of *folio 66, page 29, to the bottom of folio 70, on page 32, and admission of plaintiffs' attorney Kirton, bottom of folio 70, page 32*, and also *Exhibits 1-1 to 1-20 on pages 33 to 39, inclusive*, and also see testimony of Frank W. Teagard, another of plaintiffs' witnesses, found on *pages 50 and 51 in folio 97*, and further at *page 51, folios 96, 97*. See also the testimony of James E. Boyd, one of the plaintiffs, at *folio 136, page 80*, where he gives a full and clear explanation of the whole working of the clearing-house.

In addition to the fact that the defendant Hansen was in no way connected with the clearing-house settlements, and never authorized them, comes in the *last proviso of section 9, of rule 22, found on page 74 in folio 127*, which we have before quoted in full, and which declares in terms that such clearing-house settlements were not for the benefit of Hansen and conferred no advantage upon him, but left him obligated as principal exactly as he was before the settlement was made. It is as follows:

"Provided that in case of substitution of one contract for another, or of offsets or settlements of contracts in pursuance of such rules, regulations or customs, the member or firm making the same shall be held to guaranty to his or their principal the ultimate fulfillment of the original contract made under such order, *and the principal also* (that means Hansen) *continuing liable on such original contract, the same as though no substitution, offset or settlement were made.*"

Now, how can these plaintiffs claim to recover from Hansen for moneys paid out under these circumstances, when he has derived no benefit whatever from such payments, and is now liable on every contract that the plaintiffs made for him, if he ever was, exactly as if such payments had not been made?

Referring back to the heading of "Margins," in this argument, we will call your honors' attention to certain of the testimony which brings this case exactly within the ruling in the case of *Lyon, et al., vs. Culbertson, et al., 83 Ill. page 33.* The point in the case cited from Illinois is as follows:

"A contract for the sale of wheat in store, to be delivered at a future time, which requires the parties to put up margins as security, and provides that if either party fails, on notice, to put up further margins according to the market price, the other may treat the contract as filled immediately, and recover the difference between the contract and market price, without offering to perform on his part, or showing an ability to perform, is illegal and void, as having a pernicious tendency."

We have shown before that the contract required the putting up of margins. We will now show that on a failure to keep margins good the other party may treat the contract as filled, and close him out.

See page 102, folio 165, where this testimony appears from the plaintiffs' witness, Mr. Brush. A telegram is sent from the plaintiffs to the defendant, as follows:

"Chicago, Ill.

To Theodore Hansen, Benson.

You are long 25,000 July, and 40,000 June wheat. We will hold no longer unless you put up additional margins. Ans. immediately. James E. Boyd & Bros."

"Q. Now about that June sale; you were there at the time of the June sale that was made June 8th?

A. Yes, sir; I was there June 8th.

Q. On whose order was that sale made?

A. I don't know.

Q. At that June sale the whole deal was closed and sold out, was it not?

A. I couldn't tell you the day, I presume that was the date."

Again in the same *folio 165*, we have this:

"Q. With reference to the closing out a deal, isn't this the rule with the board of trade in Chicago and with you, that where the party is responsible and requests the broker to carry him, that credit is frequently given to such customers?

A. Yes, sir.

Q. And when that credit has run to a certain limit, as far as the broker deems prudent, he will then require the customer to put up a margin or else he will close him out?

A. Yes, sir.

Q. Isn't it a fact that a broker has no right to close a customer out until he has called on him for margins and given him time to produce it?

A. Yes, sir."

Again we call your honors' attention to the testimony of the defendant on the same subject, see *page 130, folio 200:*

"Q. Was it not part of your arrangement with these men that if you didn't put up margins enough to keep the deal covered they had a right to sell out the deal for you?

A. Yes, sir; that is the way I understood it."

And again in *folio 201, page 130,* the defendant testifies as follows:

"Q. Didn't you agree with them that if you didn't keep your margins up, they having bought the wheat for you, that they could sell it?

A. Yes, sir; I didn't expect them to hold the deal any longer if I didn't put up a margin."

There is no pretense that in any of these sales or purchases there was ever a tender of wheat, or performance or tender of performance, or evidence of an intention or ability to perform. Therefore, if the Illinois case (*83 Ill. Rep. p. 33*) is authority, the case at bar falls exactly within its rulings, and we desire that the court should carefully examine that case, as we think it is based on excellent reasoning, and the soundest of principles.

VIII.

The point we now make, and which involves a large part of the damages embraced in the judgment, is a most palpable error, and entitles us to a reversal of the judgment. It is this: As early as March 19, 1889, the defendant was behind in his margins to the amount of $5000, (see letter of G. M. Brush, the plaintiffs' agent, on *page 98, folio 159*, and the further letter of said Brush of date April 5, 1889, found on *page 98, at beginning of folio 159,*) and that the plaintiffs were pressing him for payment. To these letters the defendant answered by letter on April 8th, 1889, found on *page 94, folio 154*, as follows:

"Benson, Minn., Apr. 8, 1889.

J. N. Brush, Esq.,
Minneapolis, Minn.

Dear Sir:—I have received your message, but as to more margins I cannot do anything at present more than I have done, as I told you before. Yours truly, Theo. Hansen."

Then follows a telegram from the plaintiffs to the defendant, found on *page 102, beginning at folio 165*, as follows:

"Chicago, Ill.

To Theodore Hansen, Benson.

You are long 25,000 July, and 40,000 June wheat. We will hold no longer unless you put up additional margins.

James E. Boyd & Bro."

This telegram is without date, but refers to the subject in hand.

Then follows a telegram from plaintiffs to defendant of April 26, 1889, as follows, *folio 174, page 109:*

"Theodore Hansen, Esq.,

Benson, Minn.

Please wire us your instructions as to disposal of your May wheat. We can change it into June at a difference of about ½ to ¾ of a cent. If you want to change it over you will have to do it before Thursday. Boyd Bros.,

By G. M. Brush."

To this telegram the defendant makes no answer.

This is followed by a further telegram from the plaintiffs to the defendant of date April 29th, 1889, as follows, *folio 175, page 110:*

"Theo. Hansen,

Benson.

Shall we change your May wheat over to June? To-day is your last chance. Ans. J. E. Boyd & Bro."

There was no response to this telegram by the defendant.

On the same day, April 29th, 1889, the plaintiffs' agent at Minneapolis telegraphs to H. C. Murphy, one of the plaintiffs' agents at Chicago, *folio 175, page 110,* as follows:

"To H. C. Murphy.

Don't forget to change the Hansen business over. Brush."

On the 29th day of April, 1889, the very day on which the plaintiffs had telegraphed to Hansen for instructions as to whether they should turn his May

wheat into June, and before receiving any answer, they turned it over.

See Exhibit 1-17, page 38, and Exhibit 1-18, same page, folios 79 and 80. Also report of this unauthorized act, plaintiffs Exhibit M on page 95, folio 155.

This unauthorized extension of May wheat to June made a loss for Hansen of $1300, as appears by the exhibits last referred to, which plaintiffs have been permitted to recover.

Up to this point, the correspondence in evidence clearly shows that Hansen had not only not authorized this change, but had virtually and affirmatively by implication refused to make it. His refusal is found in the plaintiffs' telegram of April 26, 1889, *see page 109, folio 174,* in which they tell him they can do it for from ½ to ¾ of a cent a bushel, and he refuses, by silence, to send the money to make the change, and does not authorize the plaintiffs to advance it for him. In fact, by not answering, he declines to have anything to do with it; and this is fortified by his previous letter, of date April 8th, 1889, (*folio 154, page 94,*) in which he says he cannot advance any further money to carry on or carry out these deals.

Further on, and in the testimony of the defendant Hansen, found on *pages 117, bottom of page, page 118 and 119, top of page 120, down to 188th folio,* the court will find a most explicit and emphatic denial of any authority to make the change of the wheat from May to June.

But the plaintiffs, admitting that there was no authority to make this change, claim that the defendant ratified the unauthorized change which they had made, and they base that claim upon the

correspondence above set out, and the letter which they received from the defendant, of date May 17th, 1889, found on *page 129, folios 199 and 200.*

A perusal of the testimony will show the court that this letter had no reference to the change of the May wheat to June at all, but referred to previous transactions as stated by the witness Handy on *pages 28 and 29, folios 65 and 66*, where he explains all about the giving of these wheat receipts; what they were given for, and where they were given, and makes it perfectly clear that Hansen's letter referring to such receipts had nothing whatever to do with the changing of the May wheat into June.

Add to this the testimony of Hansen immediately following the introduction of the letter on *page 129*, where he states as follows, and clinches the whole matter:

"Q. You wrote that letter on the 17th of May?

A. Yes, sir.

Q. You had known for 18 days of their having changed this May wheat over to June wheat, and that they had done that without your authority?

A. Yes, sir.

Q. And you promised in that letter to ship in more wheat to pay the very losses which you had incurred from that transfer without your authority?

A. That surrender was some wheat on losses that I had made in February.

Q. You don't say so! You say on the whole thing?

A. That was on losses that were on deals closed out on February 6th.

Q. Why didn't you say to them when you wrote this long letter,—why didn't you say to them, I object to pay any losses that were incurred on account of that change?

A. Because I didn't consider that I have anything to do with the deal."

It is also claimed that Hansen admitted the account of the plaintiffs when presented to him, and the court refers to this in its charge. This account referred to is *Exhibit 1-19, on page 39, folio 81*, and the testimony on which the admission is claimed is that of the plaintiffs' witness, L. E. Murphy, found beginning on *page 103, folio 166*, to and including his cross-examination on *page 105, folio 168*. See also the testimony of plaintiffs' witness Handy, at *page 28, folios 64 and 65*, where he testifies to an admission by Hansen of his indebtedness to plaintiffs.

As to this testimony of Handy, there are two features that dispose of it:

1st. It was a casual conversation which occurred in August, 1889, long after this action was commenced, and no account was presented or referred to between the parties.

2d. At that time, and from the 1st of February preceding, there was and had been and had continued to be an admitted loss and indebtedness of $6,506.25 on deals admitted to have been authorized, as shown in defendant's *Exhibit 2, page 40, folio 84*, which admissions appear repeatedly throughout the evidence, and especially in that of the witness Brush; and the conversation is fully met by these existing conditions without extending it to the unauthorized deal of changing May wheat to June, on which another loss was made of about $1300.

We especially call attention to the fact that Murphy presented the account (*Exhibit 1-19*) to Hansen on June 10th, and this suit was commenced on June 11th, the next day, as appears on *page 104, folio 168*. It cannot be said that the holding of that statement by Hansen without objection for a single

day could have turned it into an account stated between himself and the plaintiffs. No estoppel can be claimed from any of these acts as involving the rights of third parties, because the parties with whom the plaintiffs dealt on the board of trade have never even been disclosed to the defendant, and they were all satisfied through the clearing-house. Nor as to the plaintiffs themselves, they having knowingly acted without authority.

This includes all the testimony that bears on the ratification of this transaction, and upon this testimony the court, at *pages 140-141, folio 216*, charged the jury that if they "found from the evidence that the plaintiffs, about April 29, 1889, informed the defendant by letter that the forty thousand bushels of May wheat in question could be at that time changed to June wheat, and that the defendant made no answer thereto, and if you further believe from the evidence that said May wheat was changed over into June for and on account of the defendant, and that the plaintiffs rendered an account, a report and statement that said change had been made, and the defendant received such report and statement, and retained it and made no objection to such change of said May wheat to June, then such facts amounted to and were a ratification on the part of the defendant of the acts of the plaintiffs in making such change."

Here the court tells the jury that if the plaintiffs told the defendant that they could make this change, and then told him that they had made it, and he paid no attention to either report, that it was a ratification of the act of making the change, which of course is not the law.

See for this charge *page 140, bottom of page, and top of page 141, folio 216,* and for our exception thereto bill of exceptions, *page 147, folios 226 and 227.*

A ratification of an unauthorized act can only be accomplished by some affirmative recognition of the same, indicating an intention to make the act his own by the party ratifying, and this must be done with a full knowledge of all the facts; silence, and especially a silence from which a refusal to comply with one of the conditions proposed by these plaintiffs in this instance, as appears in their telegram of April 26, 1889, (*page 109, folio 174,*) suggesting the payment by defendant of ½ or ¾ of a cent a bushel to effect the change, the defendant having previously declined to advance any more money. See letter of defendant to plaintiffs, *page 94, folio 154,* cannot work a ratification of anything.

The position here is very different from the ordinary case where one party performs an act for another without authority and then reports it, and the other acquiesces, and makes it his own. Here the plaintiffs *wanted to do this act,* and applied to the defendant for authority to perform it, and the defendant declined to give them any such authority. In the face of this they go on and do it. One of the vices and errors of the charge which declares that if the jury find the facts claimed that they amount in the law to a ratification is this: that he includes in this charge acts which anticipated the acts done, and which should be counted in repudiation of authority to do it with matters occurring after the act done, and mingles them all together and calls it a ratification.

The charge on this point, taken as a whole, in

effect assumes that the plaintiffs had some right to make the change of May wheat to June, and that it devolved upon the defendant to repudiate it, or it would become his own, which is clearly untenable in law and was calculated to and did evidently mislead the jury into charging the defendant with the consequences of that act.

IX.

We will now take up our exceptions to the charge of the court, beginning with the one that relates to what the court says to the jury on the subject of "scalps," (*page 146, folios 225 and 226,*) and continue seriatim, omitting his first charge on the ratification of the change of May wheat to June, having heretofore discussed that point.

This part of the judge's charge is quoted in full in the second point made above in this argument, and we here repeat it:

> "The time during which these transactions occurred commenced in August, 1888, and were concluded and the whole transaction finally closed up in June, 1889. The plaintiffs claim that the defendant applied to the Minneapolis office to employ them to sell and purchase wheat for future delivery, that he enquired of the manager the commission to be charged, and was informed of the rates, and also told by the manager in charge that it was a good time to make some scalps, but what that term means has not been developed by the testimony."

—and proceed to show that the court, when it told the jury "that the meaning of the term 'scalp' had not been determined by the testimony," committed an error in fact, as is stated in our exception thereto taken on *page 146, folios 225 and 226,* in the following words:

"And said statement or charge by the court here excepted to was error, and a denial of the actual testimony introduced on the part of the defendant on the trial of said action, and material to his defense;"

—which testimony, explanatory of the term "scalp" is found on *pages 114 and 115, folio 181*, in the evidence of the defendant, as follows:

"Q. Now, you have stated about the conversation between you and Mr. Handy, and you made use of a word that we don't understand. You said Mr. Handy said it was a good time to make a few 'scalps.' What do you mean by the word 'scalps?'

A. That word is used on exchange frequently, when they mean taking a short time, buy and sell as quick as you see a profit, and when you have a loss close it out at any moment.

Q. At a loss?

A. Yes, sir; at a loss or at a profit, taking it out and closing it out when you can get a small profit.

Q. Suppose you have a gain?

A. You can take it in at any time you want to.

Q. Then a scalp means a short deal that is closed out in a short time?

A. Yes, sir.

Q. To be taken in a short time?

A. Yes, sir.

The Court: Q. Do you mean that you sell May wheat, and that you had previously bought May wheat and that it was settled before May?

A. Yes, sir."

Here we call the court's attention to *Exhibits 1-1, 1-2, 1-3, 1-4 and 1-5, pages 33 and 34, folios 71 and 72*, which show very short deals purely of the nature of "scalps," as described by the defendant, and in fact all the deals are of the same character, and prove that the word "scalps" in the agreement, which the court told the jury there had been no definition of, was the basic term of, and characterized the whole transaction; and it must be remembered that this evidence stands uncontradicted and acquiesced in by all parties.

If the withdrawal of this very important evidence from the jury by the court does not constitute error, and such error as is fatal to the judgment, we are at a loss to know what would be so considered. It in terms instructs the jury to regard the word "scalps" as meaningless, when in fact it was proven to be the most potent word in the whole transaction for mischief.

The 2d exception to the charge presented in the 8th assignment of error, is so fully discussed under other heads, that we do not repeat it. *Record, page 147, folio 226.*

As to the 3d exception to the charge, which is the 9th assignment of error, *page 19 of Record*, we have nothing further to say, having discussed it in our point VIII of this argument, and again in our 10th exception, *page 151, folio 233.*

X.

Our next exception to the charge of the court is found on *pages 147 and 148, folio 227*, 4th exception to charge and 10th assignment of error, where the court makes use of the following language:

"The plaintiffs' theory is, and evidence has been introduced tending to sustain it, * * * that in every instance actual delivery of wheat was *intended* by the parties to the contracts made for the defendant's account, and that these contracts were closed and settled up by the plaintiffs in accordance with these terms, *and at the defendant's request*, and advances were made and their own money paid out for his benefit."

Our exception to this is placed on the ground that there is nothing in the pleadings, evidence or record to justify such theory (on the part of the plaintiffs); that the portion of the charge here excepted to is

prejudicial to the defendant, tends to mislead the jury, and is error in the charge and error in law on the whole evidence in the case. (*Folio 227.*)

The errors comprised in this part of the charge are so numerous and universal that it is with difficulty that we attempt to single them out for discussion.

1st. The theory of the plaintiffs *is not* that actual delivery of wheat was *intended* by the parties, and there is no evidence in the case tending to sustain anything of the kind, but it is all to the contrary. The theory of the plaintiffs, as we have shown by their agreement in this argument, was that the delivery of wheat was not *intended*, but only *contemplated* as a possible contingency, which might happen, but was not *intended* to happen if the parties could *offset* and *cover* their contracts in time to prevent it. The broadest claim or theory put forth by the plaintiffs themselves is, that if the contracts were carried forward to the month of delivery, then a delivery might follow, but they knew they could prevent it in every case by hedging, covering or offsetting; and to leave no doubt of their actual intentions, they did hedge, cover and offset in every instance throughout the whole connection. As to the defendant's intentions to buy or sell actual wheat on any of these transactions, see his testimony on *pages 120-121, folios 188-189*, where he denies any such intention.

For a fuller presentation of this proposition, we refer the court to point V of this argument, where the clause of the agreement in reference to the intention of the parties as to the delivery of actual wheat is thoroughly discussed.

2d. Where the court under this head says to the jury: "And that these contracts were closed and settled up in accordance with *these terms*, and at the *defendant's request*," he necessarily refers to what immediately precedes it in his charge, and that is, "that in every instance actual delivery of wheat was intended by the parties," which is a repetition of the error which we have just discussed, and an absolute misstatement of fact, because none of the contracts were ever settled in any such way.

3d. The court further says that "advances were made and their own money paid out for his benefit." We have already shown that the defendant had nothing whatever to do with the clearing-house, and that all settlements there made were by the brokers for their own benefit, and that any contract settled by offset or substitution left the principal just as much under obligation after the settlement as before, and Hansen is just as much indebted to the people with whom he made contracts through the plaintiffs now as he ever was. So how could any money paid out by the plaintiffs through the clearing-house be for defendant's benefit? For the full discussion of this matter we refer the court to point VII of this argument, in which we discuss the matter of the clearing-house settlements and the effect of *section 9 of rule 22*, of the board of trade, found on *page 74 near end of folio 127*.

There can be no doubt that a charge so full of error, and error all tending to support the theory of the plaintiff, and defeat the defense, as this is shown to be, could not fail to mislead the jury to the prejudice of the defendant.

We refer the court for our views on *exception 5, assignment of errors 11, page 148, folio 228* to our argument under the head of "*Margins.*"

XI.

Our next exception is to that part of the charge found on *pages 148 and 149, folio 229*, and the grounds of our exception, as stated, go to the fact that the court assumes that the contract may be a valid one, and after explaining to the jury what elements constitute a valid contract, submits the question whether under the evidence this contract possesses these elements and is a valid contract. The error in this charge is the assumption that this contract can be valid under the evidence at all, and that any ground existed in the evidence for the jury to find it valid, and goes to the whole case after all the evidence was in, and brings up exactly the same question presented by our motion made at the close of the plaintiffs' case, to take the case from the jury, and instruct for the defendant. It is in fact a renewal of that exception, at the close of the whole evidence.

XII.

Our next exception is to the part of the charge recited on *page 149, folios 229 and 230*, and is in the following language:

"On the ground that there is nothing in the pleadings, evidence or record in this action to support or justify the theory of the plaintiffs stated by the court in this part of the charge here excepted to. That the portion of said charge here excepted to is prejudicial to the defendant, and is misleading to the jury; is error in the charge and error in law on all the evidence and facts in the case."

There is the same error in the part of the charge covered by this exception that we urge to the two portions of such charge excepted to in the two points immediately preceding this one.

XIII.

We here call attention to that portion of the charge found on *pages 149 and 150, folios 230, 231 and 232*, excepted to by the defendant. The exception is the same in substance as that taken to the three portions of the charge immediately preceding, and we claim the errors to be a recapitulation and restatement to the jury of each and all, and the same errors as are found in those extracts, with this additional feature. The court tells the jury that if the plaintiffs were ignorant of the defendant's intention to gamble, then the agreement made between them and the defendant, and the contracts made by the plaintiffs on the board of trade, were valid.

We claim that on the evidence in this case such ignorance was simply impossible; that knowledge exists in the very terms of the original agreement between plaintiffs and defendant, and in every subsequent act of the parties under such agreement, and it was prejudicial error to submit any such question to the jury.

We have argued this position in our first point as to the nature of the contract itself, and in our sixth point as to the guilty knowledge of the brokers, to which we respectfully refer the court.

XIV.

We next except to the following part of the charge found on *pages 150 and 151, folios 232 and 233,* near the bottom of the page, in the following words:

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations, as prescribed by the board of trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, *that is not evidence of their illegality.* The mode of settlement of *bona fide* contracts for the sale of actual wheat, does not affect the validity of the contract, if the original intention was to purchase, receive, take and deliver the actual wheat at the time specified when the contracts were made."

The court will find the argument in the language of the exception, which is as follows:

"On the ground that the offsets and modes of settlement stated and referred to in the part of the charge here excepted to belonged to the jury as proper and competent evidence, to be considered by them in determining the entire scope and character of said contracts, and of the original and entire intentions of the plaintiffs and defendant in respect thereto, and as affecting and showing the original intention with which said contracts were made, and were to be executed and closed; that said charge here excepted to characterizes said evidence as no evidence, and virtually takes the same from the jury; that said charge here excepted (to) is prejudicial to the defendant, is misleading to the jury, and is otherwise error in law."

XV.

The last exception to the charge of the court taken by the defendant, is found on *page 151, folio 233.*

In this the court says to the jury: "The plaintiffs have introduced facts and circumstances tending to show that that order was given." The court here refers to an imaginary order to change the May

wheat over to June, which has all been discussed under our point number VIII above; where we have shown that not only no facts or circumstances tending to show that Hansen made any such order were introduced, but that he, by his silence, declined to have anything to do with the changing of this May wheat to June, either by original order or by ratification of the unauthorized act of the plaintiffs after it was done. How the court could have fallen into this error of fact, after having charged the jury upon the plaintiffs' theory of a ratification by the defendant of an unauthorized act of the plaintiffs in this respect, we are utterly unable to understand, because the two positions—one that the plaintiffs acted without authority, and their act was ratified by the defendant, and the other that the defendant made the order before the act was done—cannot stand together.

There is no such evidence in the case, and there is no claim on the part of the plaintiffs that any such was given, and the only claim they make to entitle them to recover for the losses on the May wheat changed into June is, that we ratified their unauthorized act in making such change.

There is further error in fact in this last part of the court's charge which is very detrimental to the defendant. He says: "and in addition to that, they have introduced the testimony of witnesses who testify as to an admission on the part of the defendant that the account was a correct account." (Referring to *Exhibit 1-19, page 39, folio 86.*)

This point has been discussed in our argument in point number VIII, where we show that he made no such admission, but what admission he did make

had reference only to losses made on certain deals, the making of which defendant had authorized, and all of which were anterior to February 1st, 1889.

The court errs again on a matter of fact when it says: "and also the account rendered (which is *Exhibit 1-19, page 39, folio 81,*) was put in his hands in the neighborhood of the 29th of April or thereabouts." That this statement is not correct in fact, is found in account itself. It bears date the 10th day of June, 1889, and embraces items of account of date as late as June 7th, 1889; and the date when it was put in the defendant's hands is shown by the witness L. E. Murphy, who is the party who gave it to the defendant. (See his testimony on *page 103, bottom of folio 166,* up to *folio 169, page 105,* which testimony has been before referred to in this argument at point VIII.) In this testimony, Mr. Murphy, plaintiffs' witness, expressly says that he delivered this account to defendant at the office of the plaintiffs in Minneapolis on the 10th day of June, 1889, one day before the suit was commenced, and there is no testimony to the contrary.

It is patent that this mistake of the court misled the jury in this respect: Had the account been delivered to the defendant on the 29th of April or thereabouts, as the court tells the jury it was, they would or could have inferred from his holding it without saying anything about it, that he admitted it, whereas, if the court had told the jury that it was only presented to the defendant the day before the suit was commenced, they could not have drawn any such inference.

If there should be any question raised as to whether the account presented to Hansen was *Exhibit 1-18*

or 1-19, we simply call the court's attention to the fact that one bears date June 8th and the other June 10th, 1889, and both refer to matters as late as June 7th and June 8th, so it is immaterial which was the one presented.

The court further refers to a letter received by Hansen from the plaintiffs which must refer to *Exhibit "M," page 95, folio 155*. This letter is simply (if that is what the court means when he refers to a letter) an announcement to Hansen that the change had been made from May to June wheat. It was an act wholly unauthorized by the defendant, and done at the risk and on the account of the plaintiffs, and called for no answer on the part of Hansen, and he gave it none. Of course, nothing can be inferred against him from his silence, as we have before shown. The misleading feature of this charge is to give the jury the idea that the account presented to him and the letter (*Exhibit "M"*) were all presented as early as April 29th, when in fact the account (*Exhibit 1-19*) was not presented until June 10th, the day before the commencement of the suit.

The court further adds this misstatement of fact:

"That he retained the account, and had correspondence with the plaintiffs afterward without mentioning or raising any objection to it."

This court must see at a glance that the charge is all wrong on this point. The defendant only got the account on the day before the suit was commenced, and had, and could have had, no correspondence with the plaintiffs after receiving the same, but the manner in which the court misstates this fact to the jury leaves the impression with them that the silence of the defendant amounted to a ratifica-

tion of the unauthorized act of the plaintiffs. And he then charges them on these erroneously stated facts as follows:

"If you find from the evidence all these facts, you are to say whether it did, or did not amount to a ratification. If the facts are true, then there is a ratification."

The truth of all this matter which the court presented to the jury in such an unintelligent jumble of misstated facts is this: On the 29th of April the plaintiffs made the change of May wheat to June wheat, without any authority from the defendant, and reported the same to him about that time, *Exhibit "M," page 95, folio 155*, to which report he made no response, and on the 10th day of June gave him the accounts, *Exhibits 1-18 and 1-19*, and sued him the next day, which acts can not be tortured into a ratification, but in the erroneous way in which the court presented them, and under the instruction of the court, the jury found a ratification. Prejudice to the defendant must be presumed from this part of the charge here excepted to. Its influence on the jury cannot be overstated, and amounts to a mistrial.

We close this somewhat lengthy argument of a very important and interesting case, with an appeal to the court to carefully unravel its intricacies, which exist more in finding the evidence in support of our positions than in any difficulty in the law governing such positions. We have endeavored to assist the court by copious quotations, and in all cases careful references to the testimony, and only refrained from further extending the same for fear of rendering our brief cumbersome.

From the nature of the case we feel assured that our side of it will commend itself to the favorable consideration of the court, which will always exert its influence and power in the support of public morals, and to defeat all attempts to violate the law.

The judgment should be reversed.

CHAS. E. FLANDRAU,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 17 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 113.

THEODORE HANSEN,
Plaintiff in Error,

vs.

JAMES E. BOYD, ET AL.,
Defendants in Error.

Suggestions as to the Seasonableness of the Allowance of the Bill of Exceptions in this Action.

CHAS. E. FLANDRAU,
Counsel for Plaintiff in Error.

H. M. SMYTH PRINTING COMPANY, ST. PAUL

UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1894. (No. 396.)
OCTOBER TERM, 1895. (No. 113.)

THEODORE HANSEN,
Plaintiff in Error,

vs.

JAMES E. BOYD, and Others,
Defendants in Error.

SUGGESTIONS AS TO THE SEASONABLENESS OF THE ALLOWANCE OF THE BILL OF EXCEPTIONS IN THIS ACTION, MADE IN PURSUANCE OF AN ORDER OF THIS COURT FILED THEREIN ON THE 6TH DAY OF JANUARY, A. D. 1896.

To the Supreme Court of the United States and the Honorable Judges thereof:

The facts in relation to the apparent delay in the allowance and filing of the bill of exceptions in this case are as follows:

The verdict was rendered on February 8th, 1890, and a stay of entry of judgment was made for twenty days; on February 12th, 1890, the stay was

set aside and judgment entered, and execution thereon stayed for forty-two days. On March 25th, 1890, a petition was filed for a new trial, and on the same day a stipulation was entered into between the parties to said action relating to certain depositions and exhibits which were to go into the record of said case. On the 9th day of June, 1890, a stipulation was entered into between the parties to said action and their attorneys extending the time for the preparation and service of a bill of exceptions in said case until the last day of the June term of 1890, and also allowing the plaintiffs, after the service of the proposed bill of exceptions, a reasonable time to prepare and serve amendments to the same; and it was also by said stipulation agreed that such bill of exceptions, together with the proposed amendments thereto, should be settled and allowed by the court, and have the same force and effect as if it had been filed and allowed at the December term, 1889, at which the said action was tried and judgment rendered.

That stipulation was filed in the court on the 10th day of June, 1890, a certified copy of which is returned with these suggestions to this court.

On the 5th day of December, 1890, motion was made for a new trial and denied. On the 27th day of January, 1892, the bill of exceptions was presented to the court and by the court settled and allowed and ordered to be made part of the record, and was filed on March 3rd, 1892. The allowance and settlement of said bill of exceptions and the order making the same part of the record in said action is found on page 152 of the record in this court at folio 234, and is in the words following:

"And because the foregoing matters and things do not appear of record in said action, the judge who tried said cause finding the same to be true and correct, has signed and sealed this bill of exceptions, this 27th day of January, 1892, and ordered the same to be made part of the record in said action.

"R. R. NELSON, Ls.

"Endorsed: 'Bill of Exceptions, filed March 3rd, 1892. OSCAR B. HILLIS, Clerk.'"

The bill of exceptions having been made at this late period under the direct stipulation of the parties, it was not supposed to be necessary to insert such stipulation in the record, as no possible question was anticipated as to the propriety or legality of the allowance and filing of such bill, which is undoubtedly the reason why such stipulation is omitted from the record. It has always been the practice in the Minnesota district of this circuit to hold each term open after the closing of its calendar work until all matters that are usually completed in term time are fully perfected, and such was the case in this instance. The term did not adjourn for such purposes until after this bill of exceptions was allowed and filed. The practice in the courts of Minnesota has done away with all significance of "Term." It cuts no figure at all. Judgments can be rendered out of term, as well as in term; in fact, the court is always open for the transaction of any business except the trial at issues of fact. The practice of the State is made the practice of the U. S. Circuit Court by section 914 of the U. S. Revised Statutes, "any rule of court to the contrary notwithstanding."

Your honors will remember that during the progress of the argument of the case by the counsel for the plaintiff in error, Chief Justice Fuller suggested that he would like to have an explanation as to why such a long time had elapsed between the rendition of the judgment and the filing of the bill of exceptions, and that the counsel for the plaintiff in error stated that he did not conduct the trial in the court below, nor make up the record, and therefore was unable to answer the question of the Chief Justice, but that as the counsel on the other side had made no question about any irregularity arising from such delay, he understood that the record was correct and no point was made upon it, and referred the Chief Justice to the counsel for defendants in error for an answer to his suggestion, and that the counsel raised no objection whatever to the allowance and filing of the bill of exceptions at the time the same was so allowed and filed, and we had supposed that that was entirely satisfactory to the court.

As soon as we received the notice from the clerk of this court that an order had been entered requiring counsel for the plaintiff in error to present suggestions as to the seasonableness of the allowance of the bill of exceptions, we went to the office of the Clerk of the United States Circuit Court for the District of Minnesota, and procured a certified copy of the stipulation agreeing that the bill should be allowed and filed at the time it was so allowed and filed, and presented the same to his honor, Judge Nelson, who tried the case, who added his certificate thereto in the following words:

"I hereby certify that the above stipulation was on file and known to the counsel for the respective parties and to myself when the bill of exceptions was settled and allowed.

"St. Paul, January 10, 1896.

"R. R. NELSON, Judge."

We then presented such certified copy of the stipulation, with the judge's certificate thereon, to the counsel for the defendant in error, Mr. Ralph Whelan, and he entered into a stipulation ratifying the original stipulation concerning the preparation and allowance of said bill of exceptions, explaining the reason why the same was made, and also saying "that no question as to the propriety or illegality of the filing of said bill of exceptions and the allowance of the same, in pursuance of said stipulation, has ever been made by either of the parties to the said action or their attorneys, and is not now made;" and also agreeing that a certified copy of the original stipulation of June 9th, 1890, and the original certificate of Judge Nelson thereon, and the present stipulation made by him, might be filed in the Supreme Court of the United States as a supplement to and a part of the original return to said United States Supreme Court in this action, without any writ, process or other authority than such stipulation, and that the same should have the same force and effect as if it had been made a part of said original return.

A certified copy of said original stipulation, the original certificate of Judge Nelson endorsed thereon, and the stipulation above referred to as of the date of January 10th, 1896, are filed herewith in this court, as part of said original return, and copies thereof are embraced within these suggestions.

It seems to us that there can be no question about the right of parties to a suit to stipulate regarding all mere matters of practice. There is no statute law that we have been able to find which requires a bill of exceptions to be made and filed within the term at which the cause is tried, nor do we find any rule of the Circuit or the Supreme Court requiring anything of the kind; but a practice has grown up which requires that the exceptions should be taken and allowed at the trial, which was done in this case, and that a bill of exceptions presenting them formally in the record should be made up, settled and allowed at the same term, but there has never been any doubt, and none exists now, that there is nothing jurisdictional in such requirements of the practice, and that the same may be extended at will either by the stipulation of the parties or the order of the court beyond the term of the trial.

We call your honors' attention to the case of *Woods vs. Lindvall, in volume 1 of the Circuit Court of Appeals Reports, at page 34*, where the question came up on a motion to strike from the record a bill of exceptions on the ground that it was not made within the term. The opinion is written by Judge Thayer, in which the motion is overruled and the court says, in speaking of the necessity of filing a bill within the trial term, as follows:

"Thayer, District Judge. (After stating the facts as above.) We all agreed that the motion to strike out the bill of exceptions should be overruled. It is true that in several cases cited by counsel for the defendant in error, to-wit: *Walton vs. United States, 9 Wheaton, 651; Ex-parte Bradstreet, 4 Peters, 102, and Mullers vs. Ehlers, 91 U. S. 249,* it was held in

effect that, *in the absence of an order of court extending the time*, a bill of exceptions covering errors committed at the trial cannot be allowed and filed (*unless by consent of parties*) after the term has expired at which the judgment was rendered;"—plainly holding that either by order of the court or consent of the parties the bill may be filed after the expiration of the term.

See also 131 U. S. Appx. CL.

143 U. S. 293.

149 U. S. 262.

All these cases hold expressly that a bill of exceptions may be allowed and filed after the term at which the trial is had, by consent of parties or order of the court.

And as we have satisfied the court fully that this bill was filed by consent of parties at the time it was filed, and allowed by the court with a full knowledge of the existence of such stipulation, and that in fact it was filed within the term at which the trial was had, as our practice is always, as we have stated before, that such term never ends until everything growing out of it is fully completed, we think we have furnished the court with ample suggestions as to the seasonableness of the allowance of the bill of exceptions. The court will bear in mind that no one is claiming that there is anything irregular in the allowance of this bill of exceptions, but the court is simply satisfying itself that all is correct; the parties in interest want the cause decided on its merits.

We feel that we owe the court an apology perhaps for not putting the stipulation into the record; but

as the counsel in the case had such entire confidence in the honor of each other they felt that no question could be made against the terms of a stipulation solemnly entered into, and the stipulation was probably omitted both by counsel and clerk for the purpose of shortening the record, or perhaps with no intention at all.

We hope we have made the matter clear to the court, and that it will feel justified in deciding the case on its merits.

All of which is respectfully submitted.

CHAS. E. FLANDRAU,
Counsel for Defendant in Error.

United States of America—District of Minnesota.
In the Circuit Court.

JAMES E. BOYD, et. al.
vs.
THEODORE HANSEN.

STIPULATION.

It is hereby stipulated and agreed, by and between the parties to the above entitled action, that the said defendant shall have until the last day of the June Term, A. D. 1890, of said court to prepare and serve a proposed bill of exceptions in said action, and that the said plaintiffs shall have a reasonable time thereafter to prepare and serve such amendments as they may wish to make to the proposed bill of exceptions proposed by the plaintiff in said action.

And it is further stipulated and agreed that defendant's proposed bill of exceptions, and plaintiffs' proposed amendments thereto, shall be settled and allowed and shall have the force and effect as of the December, A. D. 1889, term of said court, at which said action was tried and judgment rendered.

Dated June 9th, 1890.

RALPH WHELAN,
Attorney for Plaintiffs.
WM. S. MOORE,
Attorney for Defendant.

(Endorsed): Stipulation on bill of exceptions.
Filed June 10th, 1890.

OSCAR B. HILLIS,
Clerk.

United States of America—District of Minnesota.
Third Division.—Set.

I, Oscar B. Hillis, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writing with the original thereof, which is in my custody as such clerk, and that such copy is a correct copy of such original, and of the whole thereof, in the cause therein named.

Witness my hand as clerk, and the seal of said court. Done at my office in Saint Paul, Minnesota, this 10th day of January, A. D. 1896.

OSCAR B. HILLIS,
Clerk.

[Seal of Court.]

By LOUISE B. TROTT,
Deputy.

I hereby certify that the above stipulation was on file and known to the counsel for the respective parties and to myself when the bill of exceptions was settled and allowed.

St. Paul, January 10th, 1896.

R. R. NELSON,
Judge.

United States of America—District of Minnesota.
In the Supreme Court of the United States.

THEODORE HANSEN,
Plaintiff in Error,

vs.

JAMES E. BOYD, et al.,
Defendants in Error.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties to the above entitled action, that the stipulation hereto attached, made in said action while the same was pending in the Circuit Court of the United States for the District of Minnesota, and dated June 9th, 1890, and filed June 10th, 1890, extending the time for the service of a proposed bill of exceptions in said action by the defendant therein, and amendments thereto by the plaintiffs therein, was entered into and agreed upon by the attorneys for the respective parties in said action, Ralph Whelan for the plaintiffs, and William S. Moore for the defendant, for the mutual convenience of said attorneys, they being at that time pressed with important business which rendered it inconvenient for them to prepare said bill of exceptions and have the same allowed at the term at which said cause was tried, and that no question as to the propriety or illegality of the filing of said bill of exceptions and the allowance of the same in pursuance of said stipulations has ever been made by either of the parties to said action, or their attorneys, and is not now made.

And it is further stipulated that a certified copy of said original stipulation, together with the original certificate of the Honorable R. R. Nelson, the judge who tried said action in the court below, concerning the same, dated January 10, 1896, and this stipulation, may be filed in the Supreme Court of the United States as a supplement to and a part of the original return to said United States Supreme Court in said action, without any writ, process or other authority than this stipulation, and shall have the same force and effect as if the same had been made a part of said original return.

Dated January 10, 1896.

RALPH WHELAN,
Attorney for Plaintiffs below, and Defendants in Error in the United States Supreme Court.

WM. S. MOORE,
Attorney for Defendant below.

CHAS. E. FLANDRAU,
Attorney for Plaintiff in Error in the United States Supreme Court.

Office Supreme Court U. S.
FILED.
NOV 19 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, A. D. 1894.

No. ~~806~~. 113

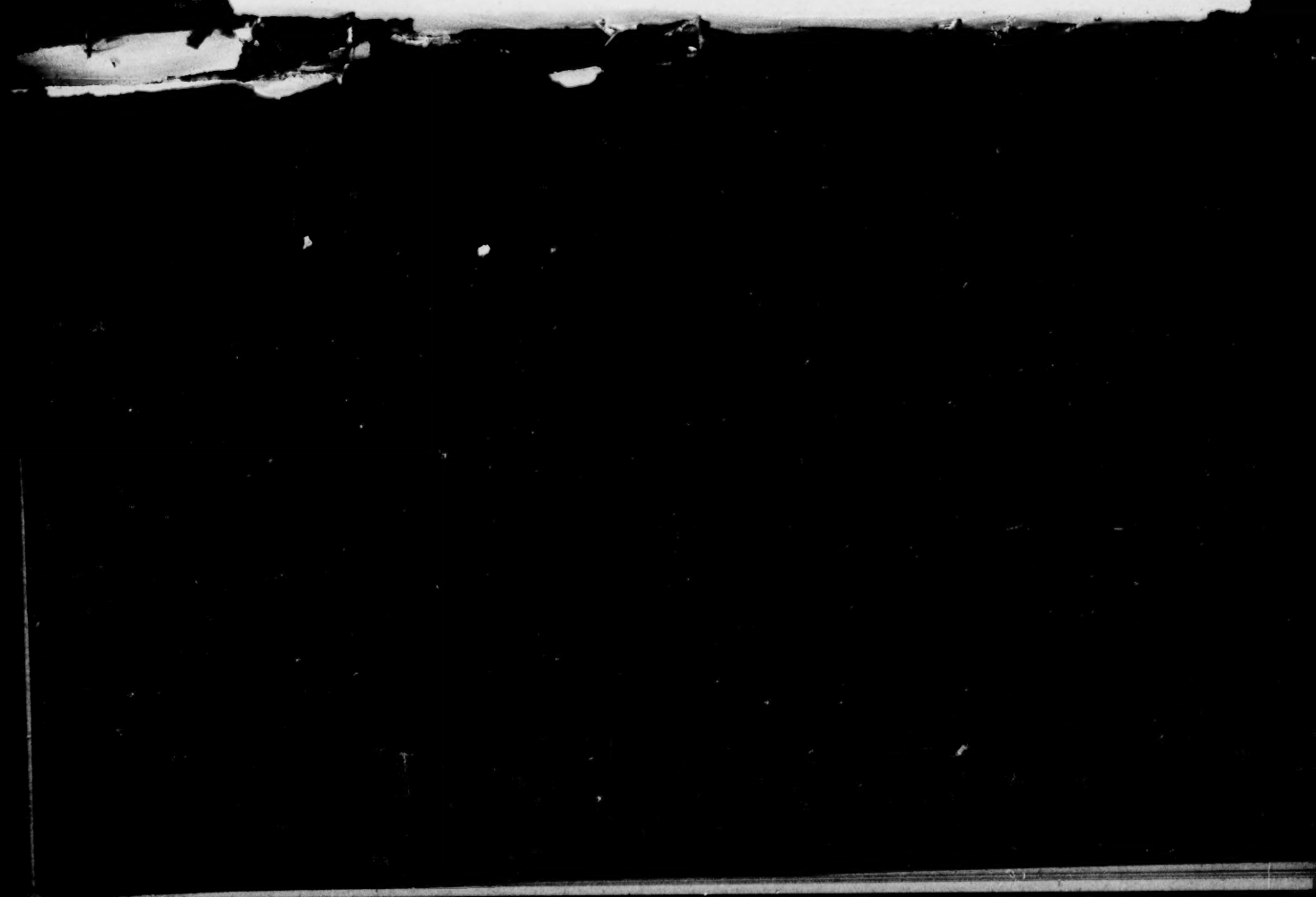
THEODORE HANSEN,
Plaintiff in Error,

vs.

JAMES E. BOYD and SAMUEL BOYD,
Defendants in Error.

Brief of Argument on behalf of Defendants in Error.

RALPH WHELAN,
KOON, WHELAN & BENNETT,
Attorneys for Defendants in Error.



Supreme Court of the United States.

October Term, A. D. 1894.

No. 396.

THEODORE HANSEN, Plaintiff in Error,

vs.

JAMES E. BOYD and SAMUEL BOYD, Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Statement of the Case.

This action was begun on June 12th, 1889, in the Circuit Court of the United States, in and for the District of Minnesota, (Rec. 7, Orig. 16) and was tried before the Hon. Rensselaer R. Nelson, acting Circuit Judge, and a jury, at the December, A. D. 1889, term of said Court, holden on February 5th, 1890, and on subsequent days. On February 12th, 1890, judgment was rendered against the defendant, Theodore Hansen, and in favor of the plaintiffs, James E. Boyd and Samuel Boyd, in the sum of $19,099.50, besides the plaintiffs' costs and disbursements. (Rec. 11-15, Orig. 28-41). Thereupon motion for a new trial was made by the defendant, and overruled by the trial Court (Rec. 15-18, Orig. 42-48). To reverse this judgment the defendant has sued out this writ of error. The plaintiffs declared on two general counts, one for money paid, laid out, and expended by them for the use of the defendant, at his request, in the sum of $17,598.36, and one for work, labor and services performed for the defendant at his request, by the plaintiffs, as his agents, in the sum of $650. The defendant pleaded the general denial, and special pleas in bar, that said money was expended and services performed by the plaintiffs according to agreement with defendant, in making and executing wagering contracts for the purchase and sale of wheat in the City of Chicago, contrary to the statutes of Illinois, provided, which special pleas were traversed by the plaintiffs. (Rec. 4-11, Orig. 10-25.)

At the time of the transactions in question, and of the commencement of this action, and long prior thereto, the defendant, Theodore Hansen, was a citizen of the State of Minnesota, residing in Benson, a town on the Great Northern railway, about 120 miles west of Minneapolis. He was there engaged in the business of general merchandise and grain, owning and operating a grain elevator and warehouses. For two years prior to the transactions here in question, he had had similar transactions, and had dealt in grain on the Board of Trade of Chicago, and on the Chamber of Commerce of Minneapolis; had been upon the floors of those exchanges, had employed brokers there to transact his business, and had a general idea of the business and the way it was there transacted. (Rec. 123-124, Orig. 192-193). The plaintiffs, James E. Boyd and Samuel Boyd, during the times aforesaid, were citizens of Illinois, and, under the firm name of James E. Boyd & Brother, were partners in business, were members of, and commission merchants doing business on the Board of Trade of Chicago, were there engaged in the business of the purchase and sale of grain and provisions, and of receiving, handling and delivering the same for themselves, and as agents for others. They had a branch office in Minneapolis, Minnesota, for the transaction of like business, in charge of an agent. Charles E. Handy was their agent here from January 1st, 1887, to February 1st, 1889. He was succeeded by L. E. Murphy, who was their agent there during February, 1889; and Murphy was succeeded by G. M. Brush, who was their agent there from February 25th or March 1st, 1889, until their business was closed, about July 1st, 1889. (Rec. 60-61, Orig. 107-108; Rec. 27-29, Orig. 63-67; Rec. 44, Orig. 88; Rec. 97, Orig. 158; Rec. 138, Orig. 212).

The transactions in question in this action on which the plaintiffs base their claim for advances and commissions, and which the defendant alleges to be wagering, were all performed by the plaintiffs on the Board of Trade of Chicago, between August 24th, 1888, and June 8th, 1889. The statements of account, defendant's Exhibits marked 1-1 to 1-20, (Rec. 33-39, Orig. 71-83) contain the record of said transactions. Said statement, "Exhibit 1-19," is the final statement of account rendered by plaintiffs to defendant, on the day of its date, June 10th, 1889. Its items from January 18th to March 16th are, with the exception of that of January 18th, all contained in the other said statements, which were rendered by the plaintiffs to the defendant about the day of their several dates. Its items of cash, March 7 to June 7, are the record of

the moneys paid by the defendant to the plaintiffs from the sale of wheat shipped by him to Kirkbride & Co., Minneapolis. (Rec. 135-137, Orig. 208-211). Said statements, Exhibits 1-1 to 1-20, stand by agreement of parties as evidence in this case, in the place of the books; as evidence of the same facts that the books would show, if in evidence; and as evidence of all other facts shown by said statements. The amount of grain purchased and sold, its price, the amount of plaintiff's advances and commissions thereon, and all other matters in said statements contained are true and correct as therein set forth, and said purchases and sales were each and all actually made by the plaintiffs for the defendant, and upon and pursuant to his orders. (Rec. 25-26, Orig. 60-63; Rec. 39, Orig. 83; Rec. 126-127, Orig. 196). This was admitted by defendant, except as to two items in said statements contained. These items are the "change" of the 40,000 bushels of May wheat to the same quantity of June wheat, on April 29th, 1889, and the sale of such June wheat on June 8th, 1889. (Exhibits 1-17 and 1-18; Rec. 38, Orig. 80). And defendant did not even question the correctness of these items, as regards the quantity of grain purchased and sold, its price, or the amount of plaintiffs' advances and commissions thereon; he only questioned their authority from him to make the purchase and sale of said 40,000 bushels of June wheat, denying that he gave plaintiffs that authority. (Rec. 25-26, Orig. 60-63; Rec. 39, Orig. 83; Rec. 126-127, Orig. 196).

The plaintiffs' agent, Handy, made the arrangement or contract with defendant, pursuant to which plaintiffs executed said transactions on the Board of Trade of Chicago. This arrangement or contract was made in Minneapolis, prior to August 25th, 1888. By it the plaintiffs were to execute the defendant's orders for the purchase and sale of grain on the Board of Trade of Chicago, at $\frac{1}{8}$ of a cent per bushel, commissions on the gross amount of grain bought and sold; the defendant was to advance one or two cents per bushel margins on all purchases and sales, and to keep such margins good, and the plaintiffs secure; and he was to have the right, whenever he had a profit in a trade, to close it out and receive payment of such profit immediately from plaintiffs; he was to abide by the rules of the Chicago Board of Trade, which were explained to him, and which required an actual delivery and receipt in every instance of the grain sold and bought; he was to receive all grain bought by plaintiffs for him and delivered to them, and pay the purchase price

for the same; and he was to deliver all grain sold by them for him on demand by the purchaser and tender of the price. He understood that actual delivery and receipt of the grain bought and sold was mutually intended in all transactions on said Board of Trade, made between the plaintiffs and the other members of said board, with whom plaintiffs dealt as agents for defendant. (Defendant, by his uncorroborated testimony, denied this agreement, so far as it related to the rules of the Chicago Board of Trade, and the contemplated receipt and delivery of actual grain on purchases and sales.) (Rec. 26-27, Orig. 63; Rec. 41-44, Orig. 85-89; Rec. 47, Orig. 92; Rec. 54, Orig. 99, 100; Rec. 112, Orig. 178; Rec. 126, Orig. 195; Rec. 132, 133, Orig. 204 and 206; Rec. 121, Orig. 189. See also rules of said Board of Trade, Rec. 66-75, Orig. 115-129, and particularly Rule IV, Rec. 66, Orig. 115.) The defendant's uncorroborated testimony in denial of this agreement in the respects stated, was the only testimony introduced by him to sustain his pleas of wagering contract,—the main issue raised by the defense before the trial Court. Pursuant to this agreement between defendant and Handy, said transactions set forth in said statements,—Exhibits 1-1 to 1-20, were executed by the plaintiffs for the defendant. (See cross-examination of witness Handy, Rec. 29-33, Orig. 66-71; of witness Teagard, Rec. 47-59, Orig. 93-106; and direct examination of defendant, Hansen, Rec. 111-123, Orig. 177-192; see also Rec. 106-109, Orig. 169-174; Rec. 61, Orig. 108.) As fast as defendant closed out, at a profit, the grain he had purchased and sold for future delivery, he received according to agreement, payment of such profit from the plaintiffs. (Rec. 30-32, Orig. 67-70; Rec. 91-92, Orig. 150-151.) The profits thus paid to him by them on said transactions amounted to over $13,000.00. (Rec. 47, Orig. 92; Rec. 105-106, Orig. 169; Rec. 127, Orig. 197). The defendant, however, broke this agreement by his failure to advance and keep up his margins. Early in January, 1889, plaintiffs, finding that defendant was failing to keep up his margins, ordered Handy to get them, or to get security for them. (Rec. 63-64, Orig. 112-113). He got security, the defendant assigning to him three elevator receipts for 9472 bushels of wheat, to be held by plaintiffs as collateral security for the money they had advanced for him as margins on said transactions, (Rec. 28-29, Orig. 65-66; Rec. 135, Orig. 209), which money, so advanced, on February 1st, 1889, amounted to about $9000, and after February 6th, 1889, on which day defendant closed out his wheat

and a partial settlement was had, amounted to $7000. (Rec. 138-139, Orig. 213-214). On the last named day defendent and L. E. Murphy, as plaintiffs' agent, agreed that defendant should ship and sell wheat to the amount of $3000, and pay the proceeds to plaintiffs to be applied in payment of the money they had advanced as margins for him, and that they would hold said elevator receipts as security for advances, as margins, by them on any future trades he might make. (Rec. 138-139, Orig. 213-214). Defendant, according to this agreement, did ship and sell wheat and pay the proceeds, $3000, to plaintiffs on March 7th, 1889. (Rec. 121, Orig. 189; Rec. 129, Orig. 200; Rec. 122, Orig. 191; "Exhibit 1-19," Rec. 39, Orig. 81). Hansen was still owing to plaintiffs money advanced, as margins for him, and their agent, Brush, repeatedly demanded money of Hansen from early in March down to June or July, 1889, (Rec. 94, Orig. 154; Rec. 97-98, Orig. 158). Brush wrote defendant on March 19th, 1889, that he owed plaintiffs $5000, asking payment or shipment of more wheat, or an elevator receipt for 10,000 bushels of wheat. (Rec. 98, Orig. 159). To secure an extension of time of payment and further credit, defendant exhibited to Brush a statement of his assets and liabilities, making a favorable showing, and proving him to be a responsible man financially, and Brush, so reported him to plaintiffs. Defendant paid some money to plaintiffs from time to time on their advances for him; he was trying constantly to pay, and so told Brush; he had wheat in transit the proceeds of which he had ordered to be turned over to plaintiffs; he told Brush that if given time he would pay to plaintiffs every cent he owed them; he said this at different times, and so throught the leniency of the plaintiffs his credit was extended and he was carried along. (Rec. 95-96, Orig. 155-157; Rec. 99-100-102, Orig. 161-165). As late as April 16th, 1889, plaintiffs bought for him on his order 40,000 bushels of May wheat, ("Exhibit 1-17." Rec. 38, Orig. 79); as late as June 5th, 6th and 7th, he paid to plaintiffs $2,464.14, in settlement of their advances, as margins, for him on said transactions, ("Exhibit 1-19," Rec. 39, Orig. 81; Rec. 136-137, Orig. 209-211); and about the time plaintiffs finally closed out his trades, on June 8th, 1889, he revoked an order theretofore given to Kirkbride & Co., of Minneapolis, to pay the proceeds of certain wheat over to plaintiffs to be applied on his indebtedness to them. (Rec. 136-137, Orig. 209-211). Before his trades were finally closed out, on said last named day, defendant told

Brush that he would pay to plaintiffs all his indebtedness to them if they would give him time. (Rec. 96, Orig. 156). In the latter part of April, 1889, while defendant was thus being carried along by the plaintiffs, on said transactions, and after they had bought for him said 40,000 bushels of May wheat, Brush asked him if he did not want to "change" said wheat to a like amount of June wheat. He said he did not know, he did not say yes or no. (Rec. 96-97, Orig. 157.) On April 26th, 1889, Brush wrote to defendant for instructions as to "changing" said 40,000 bushels May wheat to June, telling him it would have to be done before the following Thursday. Defendant received this letter but did not reply to it. (Rec. 120, Orig. 188.) On April 29th, 1889, the plaintiffs sent to defendant a telegram, asking him if they should "change" his May wheat to June, saying: "Today is your last chance." (Rec. 96-97, Orig. 157.) Defendant received this telegram and he did not reply to it. (Rec. 118-119, Orig. 186.) On the last named day, to protect defendant's interests, not hearing from him, plaintiffs sold said 40,000 bushels of May wheat and bought a like quantity of June wheat for his account, and immediately notified defendant of such purchase and sale, as he himself admits. (Rec. 103, Orig. 166; Rec. 128, Orig. 198.) On said 29th day of April, 1889, and after said sale and purchase were made, plaintiffs sent to defendant a statement of account thereof, which was received by him on that day or the next, as he admits, and retained by him, (Rec. 95, Orig. 155; Rec. 118, Orig. 185) and to which he never objected, according to his own admission, until June 10th, 1889, (Rec. 129, Orig. 199) and to which, according to plaintiffs' evidence, he never objected at all, but he, on the contrary, accepted the same, (Rec. 104-105, Orig. 167-168). On May 4th, 1889, Brush wrote the defendant that the plaintiffs demand an immediate settlement of his account, (Rec. 98, Orig. 159); Brush told him that his June wheat would be closed out at the end of the month, (Rec. 95, Orig. 155.) Defendant corresponded with the plaintiffs after April 29th, 1889, and never objected to the "change" of the 40,000 bushels May wheat to June wheat; on May 17th, 1889, eighteen days after that "change" had been made, he wrote a letter to plaintiffs, promising to ship more wheat in payment of the money they had advanced for him on said transactions, but not objecting to, and in no way referring to the "change" of said May wheat to June, or to the 40,000 bushels of June wheat which he knew they had purchased, and had advanced the

margins on for him. (Rec. 128-129, Orig. 199-200.) On June 8th, 1889, plaintiffs, after demanding margins of the defendant, and after his failure to put them up, and pay their already large advances for him, sold the said 40,000 bushels of June wheat, and closed all transactions they were carrying for defendant. On June 10th, 1889, the plaintiffs' agent, L. E. Murphy, delivered to defendant a final statement of account ("Exhibit 1-19," Rec. 39, Orig. 81), showing an indebtedness due from him to them of $18,248.36, a portion of which indebtedness arose from the "change" of said 40,000 bushels May wheat to the same quantity of June wheat, and from the sale of such June wheat on June 8th, 1889. ("Exhibits 1-17, 1-18," Rec. 38, Orig. 80.) Defendant took said statement of account, examined it, said it was larger than he had expected it would be, said he must have time to pay it, put it in his pocket, walked away, and said no more. He did not repudiate, object to, question the plaintiffs' authority to make, or in any way mention the sale of said 40,000 bushels May wheat, and the purchase of a like amount of June wheat, and the sale of the same by them for him. ("Exhibit 1-19," Rec. 39, Orig. 81; Rec. 104-105, Orig. 167-168; Rec. 110, Orig. 175; Rec. 138, Orig. 212.) On June 12th, 1889, this action was begun to recover said $18,248.36 (Rec. 7, Orig. 16.) On or about August 1st, 1889, defendant had a conversation with plaintiffs' agent, Handy, in which defendant admitted to Handy the indebtedness to the plaintiffs, which is the subject of this suit; made no claim that said transactions were fictitious; said he would have paid the plaintiffs if they had not sued him; said he was hard up, did not have the ready money, and if plaintiffs would let him alone he would pay said indebtedness to them. (Rec. 28, Orig. 65.) In addition to all this, James E. Boyd, one of the plaintiffs, testified that they never "changed" said 40,000 bushels of May wheat to a like quantity of June wheat, on their own responsibility, and without defendant's orders. (Rec. 65, Orig. 113.) Defendant, by his uncorroborated testimony on the trial below, denied that he gave the orders. (Rec. 118, Orig. 185). This issue of fact, and the issues of fact raised by the defendant's pleas of wagering contracts, were the issues submitted to the jury, and to which the trial Court, in its charge, particularly directed the jury's attention, (Rec. 140-141, Orig. 215-217; Rec. 145, Orig. 224), and which were each resolved in favor of the plaintiffs.

Points and Authorities of the Defendants in Error.

I.

The first error specified (Rec. 18, Orig. 48) is in words as follows: "The evidence in the case, and the admissions of the plaintiffs on the" "trial conclusively show that the various transactions between the" "plaintiffs and the defendant, upon which this action is based, were" "wagering and gambling contracts, and the Court erred in not so hold-" "ing, and the jury erred in not so finding." This conclusion or the question raised by this statement may be either a pure question of law, or a mixed question of law and fact. The error complained of in the decision of this question in the Court below is two-fold: "And the" Court erred in not so holding, and the jury erred in not so finding."

1. This specification of error is double, indefinite and uncertain.

> It does not "set out separately and particularly each" "error asserted, and intended to be urged," and should for that reason be disregarded by this Court.

Rules 8 and 21 of the Supreme Court of the United States.

> An assignment of error must *specifically point* out the *error* complained of.
>
> *Lucas vs. Brooks, 18 Wall. 436.*
> *Michaels vs. Post, 21 Wall. 398, 424, 425.*

Where the error specified was:

> "That the verdict and judgment were given against the" "plaintiff in error, whereas the verdict and judgment" "should have been given for the plaintiff, and he prays a" "reversal of the judgment on this ground," and this was the only error specified, this Court *held*: There is no error appearing on the record which can be noticed by this Court.
>
> *Stevens vs. Gladding, 19 How. 64, 65.*

2. The alleged error, in question, of the Court below, (if any such error be sufficiently speci .ed), cannot be reviewed by this Court, because not all, but only a part of the evidence, which was received by, and was before the Court below, has been returned to this Court, and is contained in this record, and the bill of exceptions does not by mere

statement and without detail of testimony, specify any defect in the proofs. (Rec. 151, Orig. 234; Rec. 23-151, Orig. 57-234).

> Without a return to this Court of all the evidence which was before, and was considered by the Court below in rendering judgment, or, in the absence of such evidence, without a specification of the defect in the proofs complained of, this Court cannot review the alleged error, in question, of the Court below.
>
> *Grand Trunk Ry. Co. vs. Cummings, 106 U. S. 700.*
> *Hickman vs. Jones, 9 Wall, 197.*
> *Railroad Co. vs. Jones, 95 U. S. 439.*

3. The alleged error, in question, of the Court below, (if any such error be sufficiently specified), cannot be reviewed by this Court, because the plaintiff in error, after a motion for a directed verdict in his favor, made by him in the Court below at the close of the plaintiffs' testimony, had been overruled and exception duly taken, did not rest his case on such testimony, but went on with his defence, put in testimony of his own, did not renew the motion when all the testimony in the case was taken, and the case closed, made no other motion which would exclude such testimony or take the case from the jury, made no other exception to the submission of the case to the jury, but submitted to the Court a request to charge, which the Court gave to the jury in full, and in the language requested. (Rec. 110, Orig. 175; Rec. 110-113, Orig. 176-180; Rec. 145, Orig. 223; Rec. 17, Orig. 44c).

> The refusal to instruct the jury at the close of plaintiffs' testimony to find for the defendant cannot be assigned for error, where the defendant afterwards introduced evidence in his own behalf. If at the close of the plaintiffs' testimony the defendant moves for a direct verdict, and the motion is denied, and to the denial of which he duly excepts, and thereafter he does not rest his case on such testimony, but goes on with his defense, and puts in testimony of his own, he waives the exception, and cannot insist upon it as error in this Court.
>
> *Grand Trunk Ry. Co., vs Cummings, 106 U. S. 700.*
> *Accident Ins. Co., vs Crandall, 120 U. S. 527.*
> *Northern Pacific Ry. Co., vs Mares, 123 U. S. 710.*
> *Union Iron Co., vs Smith, 124 U. S. 405.*
> *Robertson vs Perkins, 129 U. S. 233.*
> *Columbia & P. S. R. Co., vs Hawthorne, 144 U. S. 202.*

Bogk vs Gassert, 149 U. S. 17.
Wilson vs Haley Live Stock Co., 153 U. S. 39.
Runkle vs Burnham, 153 U. S. 216.
Pacific Mutual Life Ins. Co., vs Snowden, 12 U. S. App. 705.

The request to charge, above referred to, given to the jury by the Court below was the only one requested by the defendant, and was in words as follows:

> "If you should believe that it was the intention of both"
> "parties to this contract, that no actual wheat was sold, or"
> "delivered, or intended to be delivered at a future time,"
> "and if you should find from the evidence that it was not"
> "the intention of either party, that a contract should be"
> "made by plaintiffs to buy and hold wheat for de-"
> "livery to the defendant, but that it was the real intention,"
> "and the understanding of the parties that a contract"
> "should be made which should be closed at a future date,"
> "not by the delivery of the wheat and the payment of the"
> "purchase price, but by the payment of money to one"
> "party or the other, the parties to receive the same and"
> "the amount to be paid to be determined upon a basis of"
> "the difference between the agreed purchase price at the"
> "time the purchases were made, and the actual market"
> "value of the wheat, on the day when the contracts were"
> "closed, then the jury are instructed that such contracts"
> "are illegal in law and void, and you will find for the"
> "defendant." (Rec. 145, Orig. 223.)

By this request of defendant the Court below submitted to the jury in the fullest possible way, upon all the evidence in the case, the question of *the intention* of the parties to the future contracts or transactions, in question, as to the sale, purchase, delivery, and receipt of actual wheat, and as to whether these parties *intended* these contracts to be wagering or gambling within the issues tendered by the defendant in this case. By all decisions of all Courts in cases of this nature, it is held that the *real mutual intention* of the parties is the essential and material thing; and that in determining this, Courts will look not only at the form and language of the contract or transaction claimed to be gambling, but will go outside of that, and look into the facts and circumstances surrounding it or connected with it.

Embrey vs Jemison, 131 U. S. 336.
Mohr vs Miesen, 47 Minn., 229, 232.
Miles vs Andrews, 40 Ill. App. 155.

The record in this case clearly shows that the court below did this very thing, and by admission of all material evidence sought to discover the real mutual intention of the parties to these contracts, claimed by the defendant to be gambling. After this evidence was all in, the Court then submitted this question of intention to the jury for its determination in the words of the request above given. This request was not only given to the jury, upon defendant's motion and without his objection or exception, but he did not object or except to any portion of the Court's general charge to the jury embodying the substance of this request. By waiving the motion for a directed verdict, made at the close of plaintiffs' case in the court below, by failing to renew that motion when the evidence had been all taken, or to object, in any form, to the submission of the case to the jury, by moving the Court to give to the jury the foregoing request, and by not objecting or excepting to the same, the defendant acquiesced in, and is here estopped from questioning both the ruling of the Court in submitting the case, including the questioning of the intention of the parties to these contracts to the jury, and the rule of law contained in that request, and its submission to the jury.

> An objection cannot be raised in this court which has been waived in the Court below. A party who procures or acquiesces in the rulings under which a trial is conducted thereby waives the right to object to them.
>
> *Richmond Mining Co. vs. Rose, 114 U. S., 576.*
> *New York Elev. R. Co. vs. Fifth Nat. Bank, 135 U. S., 432.*

> "It is a well established doctrine that the parties to a" "suit must act consistently, and that they will not be" "heard to complain of errors which they have themselves" "committed, or have induced a trial court to commit."
>
> *Walton vs. Ry. Co., 12 U. S. App., 511, 513.*

> A party is concluded by an instruction to the jury given at his request.
>
> *Cummings vs. Baars, 36 Minn., 350.*
> *Redmond vs. Ry. Co., 39 Minn., 248.*
> *Smith vs. Pearson, 44 Minn., 397.*

The question of the intention of the parties to these contracts having thus been submitted for decision to and decided by the jury, and that decision reviewed and affirmed by the court below on motion for new trial, such decision is final; it cannot be opened or questioned in this Court.

4. The alleged error, in question, of the jury cannot be reviewed by this Court, and could not be reviewed by it even if all the evidence which was received by and was before the Court below were returned to this Court and contained within this record.

> "There shall be no reversal in the Supreme Court, or in" "a Circuit Court upon writ of error * * * * for any" "error in fact."
>
> *R. S. of U. S., Sec. 1011.*

The Supreme Court has no concern on writ of error with questions of fact; if all the testimony were set out in the record, that Court could not examine it with the view of determining whether it is sufficient to support the judgment. It has no concern on writ of error with the question whether the finding of the jury accords with the weight of evidence; it does not pass upon the credibility or sufficiency of testimony; it cannot determine the weight or effect of evidence, nor decide mixed questions of law and fact. The verdict of a jury upon questions of fact in the Court below is conclusive upon the Supreme Court in error.

Zeller's Lessee vs. Eckert, 4 Howard, 289.
Generes vs. Campbell, 11 Wall., 193.
Hepburn vs. Dubois, 12 Peters, 345.
Gregg vs. Moss, 14 Wall., 564.
Lincoln vs. Claflin, 7 Wall., 132.
York &c. Ry. Co. vs. Myers, 18 Howard, 246.
Fowler vs. Rathbones, 12 Wall., 102.

Where a principal brought an action against his broker in *assumpsit*, on the common counts, to recover back certain moneys paid and advanced by such principal to such broker, and by him used in settling contracts of purchase and sale for future delivery of grain, made and entered into by such broker for such principal with other brokers on the Chicago Board of Trade, and such principal claimed, and gave evidence tending to prove such contracts to be wagering, and such broker gave evidence *contra*, and the Court below left the issue to the jury, which found for such broker defendant, this Court *held*: "*The jury must have*"

"*found*, on the testimony, that the contracts made by Bar-"
"ber for the plaintiff on the board of trade were valid"
"contracts, and that Barber was liable on them to either"
"deliver the grain or pay the damages in case he failed to"
"deliver, because the Court charged the jury that, if the"
"proof satisfied them that, by the contracts, Barber was"
"liable to either deliver the grain or pay the damages,"
"then the contracts were not gambling contracts, and"
"they should find for the defendant. We find no error in"
"the record in the suit at law, and the judgment is"
"affirmed."

White vs. Barber, 123 U. S. 392, 420, 421.

Where an action was brought in *assumpsit* on a promissory note, and the defendant interposed special pleas in bar, alleging that the note was given alone for losses sustained by him in purchases and sales of produce, which were gambling transactions by the statute and common law of Illinois, and some evidence was introduced tending to show that the parties to those transactions intended to deliver and receive the property sold, and the issue was left to the jury which found for the plaintiffs, the Supreme Court of Illinois *held*, that, under the Illinois Practice Act, Sec. 89, providing that the Supreme Court shall re-examine cases as to questions of *law only*, the verdict having been found for the plaintiff, the Supreme Court has no jurisdiction to review whether the evidence warranted the finding or not; and that the trial and appellate Courts having passed upon this question, have finally settled it.

Cothran vs. Ellis, 125 Ill. 496.

And even appellate Courts, empowered to review both questions of law and fact, refused to review verdicts of a jury in cases where the issues are similar to those in the case at bar.

To an action upon a written guaranty of a promissory note, the defense was that the note was given in settlement of gambling deals on the Chicago Board of Trade. The Appellate Court of Illinois *held:* "The evidence showed" "the usual course of dealing in grain on the Board of" "Trade. The transactions were settled on differences, and" "may or may not have been gambling. That was a ques-" "tion for the jury under all the evidence, and on proper" "instructions. The law was given to the jury by the" "Court just as appellant requested it."

Hitchcock vs. Corn Exchange Bank, 40 Ill. App. 414.

In another case the same Court *held*, that transactions, such as appear in the case at bar, and claimed to be gam-

bling, depend upon the intention or understanding of the parties thereto in regard to them, "and further, that their" "intention or understanding was to be determined by the" "jury from all the circumstances of the case as disclosed" "by the evidence."

Miles vs. Andrews, 40 Ill. App. 155, 165.

In another the case the same Court, in an action by a broker against his principal for money advanced for certain transactions in grain on the Chicago Board of Trade, affirmed by such principal, but denied by such broker, to be gambling transactions, *held*: "Upon this issue of fact," "the parties were by themselves and their witnesses be-" "fore the jury, upon a very full presentation on both sides" "of the conversations of the parties and their correspond-" "ence before and during the time of the transaction of" "the business, as well as all the circumstances having any" "legitimate tendency to throw light on the general course" "of dealing, and also on particular transactions."

"If there was no error of law, the verdict must be taken" "as determining that the business done was regular and" "lawful, and was not gambling or dealing in options, in" "the sense that such dealings are forbidden by law. It is" "urged upon us that the verdict is clearly against the" "weight of the evidence. The fact cited as conclusive is," "that appellant never received and paid for, and never" "delivered any of the products bought or sold, and that" "his deals would aggregate a large amount. Such facts" "are proper to go the jury in connection with all the other" "evidence, but they are by no means conclusive that the" "transactions are gambling transactions, and may, in any" "given case, have but very slight significance. It may be" "true, if a course of dealing is carried on on the Board of" "Trade in the most perfect good faith, that the parties" "dealing will not be called on to receive or deliver the" "actual product bought or sold. One may sell and con-" "tract to deliver, with the valid intention of delivering" "the articles to the purchaser, but by transactions by" "himself and by other dealers, the sale may be offset" "against a purchase of a similar option, and rung up and" "settled in the clearing house without the actual receipt" "or delivery by the particular dealer of the articles" "bought or sold. What is true of one such contract is" "true of a hundred or a thousand others, and it is not" "correct to say that there is no actual wheat or other" "product in such a series of "rung up" transactions. One" "lot of wheat, when the deals come to be rung up, will" "serve to satisfy the obligations of many different pur-" "chasers or sellers. Therefore, in carrying out transac-" "tions made on the Board of Trade, in strict accordance" "with its rules, and with the law and in good faith, it may," "and as a rule will, happen that the contracts are closed" "out and settled without a given dealer being called on"

"to receive under his contract to purchase, or to deliver"
"under his contract of sale. Unless we are prepared to"
"hold that all such transactions on the board are in viola-"
"tion of law and gambling transactions, we cannot hold"
"that the fact that there are no deliveries of grain sold, is"
"conclusive evidence that when the parties made the sale"
"they did not intend to deliver."

Curtis vs. Wright, 40 Ill. App. 491, 492, 493.

In an action on a promissory note, where the defense raised was that the note was given for losses in certain gambling transactions on the Chicago Board of Trade, the jury, on the trial, found for the plaintiff, and the same Court *held*:
"It is not claimed by the defendent that there was any"
"agreement or any express understanding between him"
"and the plaintiff, at the time said sales were made, that"
"there should be no delivery of the grain sold, or that"
"settlement should be made on the basis of the differ-"
ence in price, the defendant himself testifying that"
"nothing was said between him and the plaintiff on"
"that subject, and the plaintiff testifying that said tran-"
"sactions were *bona fide* sales of grain for future delivery."
"It is insisted, however, that from the mere fact that the"
"transactions were closed out before maturity, and an"
"account of the losses rendered upon the basis of differ-"
"ences in price, it should be inferred that such was the"
"intention and expectation of the parties *ab initio*, and"
"that there was an understanding that the commodities"
"sold should not be delivered, and that settlements should"
"be made on the basis of the differences of price. Such"
"conclusion does not follow from the premises, especially"
"as the transactions were closed out for want of margins."
"We see no ground for holding that the transactions"
"out of which the indebtedness in question arose, were"
"gambling transactions, especially since the jury, whose"
"prerogative it was to weigh and construe the evidence,"
"has decided the other way."

Ware vs. Jordan, 25 Ill., App. 534, 535, 536.

"The question whether or not a grain deal is a gam-"
"bling contract is one to be determined by the jury, under"
"proper instructions; and where it is submitted to and"
"determined by a jury, and their finding is supported"
"by some evidence, and is approved by the trial Court, it"
"will not be disturbed."

Washer vs. Bond, 40 Kansas, 84.

See also

Kirkpatrick vs Adams, 20 Fed. Rep., 287.
Jackson vs. Foote, 11 Biss., 223, and note.

5. Where the bill of exceptions does not purport to contain all the evidence on the trial, nor even the substance of it, every presumption is in favor of the verdict of the jury and that it was supported by the evidence.

The City vs. Babcock, 3 Wall., 240.

II.

The second error specified (Rec. 18, Orig. 48), relates to the admissoni in evidence of certain rules of the Chicago Board of Trade. The rules so admitted in evidence are a part of Rule IV, relating to the powers and duties of the Board of Directors of the Chicago Board of Trade, a part of rule XXI, relating to deliveries of grain and other commodities bought and sold on said board, all of Rule XXII, relating to the rights of parties on contracts of purchase and sale, on said board, of commodities there dealt in, and all of Rule XXIII, relating to the failure of parties to such contracts to deliver or receive such commodities. (Rec. 66-75, Orig. 114-129). In the Court below the plaintiffs first offered in evidence a copy of all the rules of said board, in the form of a book. They were objected to by the defendant as immaterial, incompetent, not part of the *res gestæ*, not authenticated, and "that in any event only" "certain of the rules are material to this issue, and the same should be" "specified, and only those ones offered in evidence." The Court held that the rules relied on should be pointed out. (Rec. 60, Orig. 107-108). The plaintiffs then proved that Rules IV, XXI, XXII and XXIII, as they appear in the record of this case, were the rules of said Board, and in full force and effect during all the times of the transactions in question on said board, between the defendant, as principal, the plaintiffs, as his brokers, and other members of said board. (Rec. 65, Orig. 114). Said rules last named were then offered in evidence by the plaintiffs. They were "received subject to objection made above to" the original offer, and read in evidence * * * ." (Rec. 65-66, Orig. 114.

No exception was taken to the order of the Court admitting said rules in evidence, and no motion was subsequently made to exclude them.

> In error the Court can consider only objections and exceptions specifically made and taken at the trial in the Court below; and they must affirmatively appear on the record.

Pomeroy's Lessee vs. Bank of Indiana, 1 Wall. 592.
Stebbins vs. Duncan, 108 U. S. 32.
Newport News Co. vs. Pace, 158 U. S. 36.
United States vs. Breitling, 20 Howard 252.

The "objection made above to original offer," "subject" to which said rules were "received" in evidence, may be said to relate solely to their competency and materiality. Assuming objection and exception to have been duly made, taken and recorded to the order of the Court below admitting these rules in evidence, and error duly assigned, so that this Court can now review that order, that order was not error and said rules were competent and material evidence; because before, and at the time the contractual relations of principal and agent, between Theodore Hansen, and James E. Boyd, and Samuel Boyd, were formed and entered into, said Hansen both had actual notice and knowledge of the existence, nature, and contents of said rules of said board, and was put upon notice, or became and was chargeable with knowledge of said rules, and because he contracted with reference to them, and they entered into and became a part of the contract of agency between himself and said Boyds.

1. Theodore Hansen, defendant, testified that for two years before he had had the transactions in question in this suit with the Boyds, he he had had similar deals, or transactions, and had operated on said Board of Trade of Chicago; that he had been in Chicago, had been on said Board of Trade, had employed brokers there, other than the plaintiffs, to buy and sell grain for him; that he had bought and sold a large amount of grain there; that he knew about the business there in a general way, and had a general idea of the way it was transacted, prior to the transactions in question in this case; that he, prior to the transactions in question in this suit, was frequently on the floor of the Chamber of Commerce of Minneapolis; that he had sold a good deal of wheat there; that he had had option deals there, and had delt on both the Chicago Board of Trade and the Minneapolis Chamber of Commerce. He further testified, that he knew that the Boyds, during the time of the transactions in question in this suit, were operating on the Board of Trade of Chicago; that he intended that the Boyds should operate for him, under his orders on said Board of Trade, and represent him there as brokers in said transactions; that he wanted to deal in Chicago wheat,

and so hired the Boyds for that purpose; that he knew they were brokers on said Board of Trade, and bought and sold wheat, and that he believed, when he gave his orders to buy and sell wheat in the transactions in question in this case, that the purchases and sales would be made by the Boyds, on the Board of Trade of Chicago. (Rec. 123, 124 and 125, Orig. 192-194.)

Charles E. Handy, a witness called by the plaintiffs, who was their agent, had control of their Minneapolis office, and who, as their agent, made the contract between them and said Hansen, by which they bought and sold the grain in question in this case for him on the Chicago Board of Trade, as his broker and agent, testified as follows: "Q. Did you meet Mr. Hansen, the defendant, in Minneapolis? A." "Yes, sir; Mr. Hansen came to me on change; we had had some little" "talk about business, and afterwards I met him in my office, room No." "1 Chamber of Commerce, in Minneapolis, and after having some little" "business talk, he asked me on what terms we did business, and I told', "him by the customer paying us ⅛ of a cent commission per bushel," "and he would have to abide by the rules of the Chicago Board of" "Trade, and told him what the rules were as to the handling of grain" "on the Board of Trade, Chicago; also that he must keep his margins" "good at such times as the trades might be against him, so as to keep" "us secured, and that at any time he had a profit in any trade, and" "closed it out, he could have it immediately. Q. Anything further? A. I" "further went on and explained what the rules of the Chicago Board of" "Trade were, and that a delivery was contemplated in every trade, either" "by the buyer or seller which was understood by him; that in case wheat" "was delivered, he must take care of it, and pay the purchase price and" "interest on the money, etc. That was, in substance, the conversation." (Rec. 26-27, Orig. 63.) And said witness, on cross-examination, further testified: "Q. You can't recollect certainly, nor remember distinctly" "where your first conversation with reference to his taking trades with" "you occurred? A. My impression as to that is simply this: I had" "not talked business with him, nor the way of doing business with Mr." "Hansen, until he came into my office and asked me what conditions" "we wanted and I stipulated with him there as to the conditions under" "which I would take his trade, as I said before, in my direct examina-" "tion. Q. Do you remember exactly, that conversation? A. I couldn't" "report it word for word; I could tell practically what it was. The"

"question was asked me, by Mr. Hansen, how we did our business; I"
"said we would charge ⅛ of a cent commission, and expect him to keep"
"his margin good all the time; that the men I did business for were Boyd"
"Brothers of Chicago, and when there was wheat sold we were expected"
"to deliver the wheat, and when it was bought we were expected to"
"take it and pay for it, and in that case he must take it and protect us."
"Q. You told him that? A. Yes, sir. Q. You swear to that?"
"A. Yes, sir. Q. You went on and did business with him? A."
"Yes, sir. * * * * Q. You have no recollection of having that"
"talk with Mr. Hansen, have you? (Reference was here made to"
"a talk about "scalps.") A. I don't recollect having that talk with"
"Mr. Hansen, but I do recollect having a talk with him about the rules."
"Q. "About the rules?" A. "Yes, sir." * * * * * * * Q. Isn't"
"it true that at the time Mr. Hansen came up to your office, he simply"
"told you he wanted to make a trade, and nothing more? A. No, my"
"impression is that when Mr. Hansen came to my office to transact"
"business, the conversation drifted on to the rules, and the way we had"
"of doing business, because we were then at that time practically a new"
"house in Minneapolis. I was practically new to Mr. Hansen, outside"
"of a mere speaking acquaintance. I had never had any business"
"with him previous to that time. Q. You think you gave him that"
"discourse you got off here this morning on your direct examination?"
"A. I think I did; to the best of my knowledge and belief I told him"
"what I testified to this morning. Q. You have a decided recollec-"
"tion of telling that to him? A. Yes, sir; I have, because I have a"
"recollection of his asking me on what basis we did our business. Q."
"The basis or per cent of commission? A. Yes, sir; the general mode"
"of transacting our business. Q. You say you told him you did busi-"
"ness under the rules of the Board of Trade? A. Yes, sir. Q. What"
"did you tell him? A. I told him that Boyd Brothers were in the"
"commission business in Chicago, and I was their Minneapolis repre-"
"sentative. Q. Commission business? A. Grain and commission"
"business, and I was their agent in Minneapolis, and of course we"
"wanted to do business; he asked me how we did business and I"
"simply told him that we charged ⅛ of a cent commission, and we ex-"
"pected to handle the grain, and expected our customers to take and pay"
"for it if it was delivered to us in Chicago at any time. * * * *"
"Q. When you came to tell him about the Board of Trade of Chicago,"

"are you sure you told him anything about the rules of the Board of" "Trade? A. Yes, sir. Q. What did you tell him? A. I told him" "about the rules of the Board, and that if he expected to do business" "with us, he must comply with them as much as he would with any" "one else." (Rec. 41, 42, 43 and 44, Orig. 84-89.)

All of the transactions in question in this suit were executed by the Boyds, for Hansen, on the Board of Trade of the City of Chicago, pursuant to its usages, custom, rules and regulations, and said rules offered and received in evidence, and pursuant to the contract of agency, made and entered into by and between Hansen and Handy, as agent for the Boyds. (Rec. 30, 31, 32, Orig. 67-71; Rec. 61, Orig. 108; Rec. 65, Orig. 114; Rec. 106-109, Orig. 169-174; Rec. 113-117, Orig. 179-184.)

2. Said Hansen having actual notice and knowledge of said rules, they were competent and material evidence.

> In an action by Allen & Co., vs. Bibb & Co., in *assumpsit*, for services rendered, and money paid and advanced by the plaintiffs for, and on the request of the defendants, in selling for their account, and as their agents, cotton for future delivery, according to the rules and regulations of the New York Cotton Exchange, this Court said "The" "next assignment of error relied on, is in the action of the" "Court admitting in evidence the Statutes of New York" "under which the New York Cotton Exchange was organ-" "ized, together with the rules and regulations of that body" "under and in pursuance of which the transactions in ques-" "tion were conducted. This evidence was clearly compe-" "tent and revelant, because the contracts entered into be-" "tween Bibb & Company and the plaintiffs contemplated" "that the business which the plaintiffs would transact for" "their principals would be under, and in accordance with," "the rules and regulations of the New York Cotton Ex-" "change. It was proper, therefore, to show that this Cotton" "Exchange was a lawful body, organized for lawful business" "purposes, and had power to make such rules and regula-" "tions as might be deemed necessary and proper to carry" "out the purposes of its organization. It is clearly shown" "that B. S. Bibb & Company knew that the plaintiffs did" "business as cotton factors in that exchange, and in accord-" "ance with those rules and regulations and that in acting" "as their agents in the sale of cotton for future delivery," "they would transact the business through that ex-" "change, and in accordance with its rules and regula-" "tions. It was, therefore, germane to the issues in the" "case, and was both competent and relevant to prove that" "the contract between the parties had been carried out on" "the part of the plaintiffs, in the mode and according to" "the methods contemplated by the parties."

"It is settled by the weight of authority that where"
"a principal sends an order to a broker engaged in"
"an established market or trade, for a deal in that"
"trade, he confers authority upon the broker to deal"
"according to any well established usage in such market"
"or trade, especially when such usage is known to the"
"principal, and is fair in itself and does not change"
"in any essential particular the contract between the"
"principal and agent, or involves no departure from"
"the instructions of the principal; provided, the trans-"
"action for which the broker is employed is legal in"
"its character, and does not violate any rule of law, good"
"morals, or public policy. We are of opinion, there-"
"fore, that the assignment of error based upon the ad-"
"mission of this testimony is not well taken."

Bibb vs. Allen, 149 U. S. 481, 489, 490.

(See also.)

Irwin vs. Williar, 110 U. S., 499.

In an action by a principal against his broker, a commission merchant on the Chicago Board of Trade, to recover money advanced to him to purchase, and used by such broker in the purchase of corn on said board, for such principal, which corn was thereafter sold by such broker, because said principal after due notice failed to keep his margins good, the evidence showed that such broker had been dealing on said board for some time, and was familiar with its rules and custom, and that said sale of said corn had been made by such broker, under the rules of said board, which provided for sale on failure to keep margins good. It was objected that evidence of such rules and custom was incompetent and irrelevant. The Supreme Court of Illinois *held:* "The evidence was not offered for"
"the purpose of changing or varying the terms or condi-"
"tions of a contract made by the parties, nor could it be"
"resorted to for such a purpose. Where parties have set-"
"tled the terms and conditions of a contract by agree-"
"ment, they will be concluded by the contract made, re-"
"gardless of usage or custom; but here, the plaintiff was"
"dealing on the Board of Trade. He gave the defendant"
"an order to purchase for him, on the board, a certain"
"quantity of corn. He advanced the margins required by"
"the rules of the board. The grain was purchased on"
"the board. In the absence of a special agreement be-"
"tween the parties defining their respective obligations, it"
"was proper to resort to the rules and regulations exist-"
"ing on the board, for the purpose of showing the under-"
"standing of the parties as to what their relative duties"
"and obligations were, in regard to the grain purchased"
"on the board." Citing *2d Greenleaf Evidence, Sec. 251.* And the Court further said: "As the purchase was made"

"on the Board of Trade, and in view of the rules which were"
"known to both parties, we are inclined to the opinion"
"that the evidence introduced, was proper."

Corbett vs. Underwood, 83 Ill. 324.

(See also)

Oldershaw vs. Knoles, 4 Brad. (Ill. App.) 63-71.

3. Actual knowledge of said rules by said Hansen was not necessary to make them competent and relevant evidence. His long continued business transactions upon, and his acquaintance with said Chicago Board of Trade, and its methods of business, as shown by the testimony in the record, and especially that above referred to, placed him upon notice of and made him chargeable with a knowledge of said rules, and so, in this view, they are competent and relevant evidence.

Where an action was brought in United States Circuit Court, S. D. Mississippi, by factors who were members of the New Orleans Cotton Exchange, against their principal, to recover for services rendered and money paid and advanced for him by them, in purchases and sales of cotton for future delivery, on said exchange and under its rules, the evidence showed that the principal had for some years previous to the dealings in question through the plaintiffs, made through other factors similar purchases and sales of cotton on said exchange; that he had advanced money for margins; that he had paid losses; that he had visited said exchange several times; that he was well informed as to all the technical terms and phrases used by the members of said exchange in transacting business under its rules, pursuant to which rules the purchases and sales in question in the suit were made. And that he was a member of the Vicksburg Cotton Exchange. The evidence further showed that the rules of said New Orleans Cotton Exchange did not require members buying and selling there to disclose the name of their principal; that such rules made members guarantors of all their contracts for future delivery, as though each was a principal, and not an agent; that such rules permitted members, by agreement, to "ring out" contracts for future delivery, so as to substitute one contract for another, and required a deposit of one ($1.00) dollar per bale on cotton, such margin to be kept good. The Court held: That the defendant, principal, "must be presumed to have understood them (the rules" "of said exchange), and the duties, rights and obligations" "of the members of said New Orleans Cotton Exchange to" "each other in relation to the contracts made by them" "for their principal, and of the obligations of the principal" "to them" * * * * * * "and for the reasons al-" "ready stated defendant was put upon notice and charged"

"with knowledge of the said rules and regulations, and the"
"manner and mode of conducting business thereunder,"
"and is bound by them in the transactions made by the"
"plaintiffs, in accordance with said rules and regulations."

Lehman vs. Feld, 37 Fed. Rep. 852, 853, 854, 857.

In an action in United States Circuit Court, E. D. Wisconsin, by a factor, member of the Chicago Board of Trade, against his principal, for services rendered and money paid and advanced, in purchases and sales of property, for future delivery, on said Board, the Court *said*: "It has, however,"
"been a further question with the Court whether, upon an-"
"other point, the case was within the ruling of the Supreme"
"Court of the United States, in *Williar vs. Irwin*, wherein it"
"was held that the defendant was not liable to his brokers,"
"for money paid in settlement of differences, because it"
"was not shown that the method of settlement by means"
"of which differences were arrived at, were not known to"
"him, and therefore, the settlements were not made with"
"his assent." * * * * *

"The evidence in the case at bar shows that the defed-"
"ant Vosburgh must have been familiar with the methods"
"and usages of business on the Chicago Board of Trade"
"at the time when the transactions between him and the"
"plaintiff occurred. He lived not very remote from Chi-"
"cago; was frequently in that city; and had for a con-"
"siderable time been accustomed to transact business on"
"the Board of Trade through brokers whom he employed."
"He sold butter and cheese on the Board of Trade at"
"Elgin, Illinois; occasionally visited the Board of Trade in"
"Chicago with the plaintiff; and the plaintiff testifies un-"
"qualifiedly that the defendant was familiar with the meth-"
"ods of business upon the Board. This testimony is not"
"contradicted by the defendant and he nowhere in his"
"testimony attempts to deny knowledge of such methods"
"of business. He was in constant communication with"
"the plaintiff, gave orders for purchases and sales by letter"
"and telegraph, received statements from the plaintiff as"
"often as transactions took place, and no other conclusion"
"is consistent with all the facts, than that he must have"
"known the manner in which various trades made in his"
"behalf, were closed out. The case, therefore, in its facts"
"upon this point, is unlike that of *Williar vs. Irwin*."

Ward vs. Vosburgh, 31 Fed. Rep. 12, 17 and 18.

In an action in United States Circuit Court, S. D. Ohio, by a factor, member of the Chicago Board of Trade, against his principal, to recover for services rendered and money advanced, the Court even held that knowledge by such factor of the rules of said board was the knowledge of his

principal, in these words: "Now with the relation to the" "offsets. You have heard the rule of the Board of Trade" "read, and therefore I need not read it again to you, pro-" "viding that, where cross-trades exist between commis-" "sion merchants under such circumstances that they can" "be canceled, that shall be done; one shall be offset" "against the other, and new contracts substituted. Such" "a rule to be binding upon the customer, must be known" "to him, as I understand the decision of the Supreme" "Court of the United States. But if it is known to his broker" "it is the same thing as though known to him, because he" "makes his broker his agent, and the knowledge of the" "broker, therefore, is chargeable to him, and he is bound" "by it, so that if he made Mr. Forbus his agent and Mr." "Forbus, as he testifies, knew of this rule, Mr. Hoeffing-" "hoff is bound by it."

Edwards vs. Hoeffinghoff, 38 Fed. Rep. 635-643.

(See also)

Samuels vs. Oliver, 130 Ill. 73, 78 and 79.

Oldershaw vs. Knoles, 4 Brad. (Ill. App.) 63-68-70-78.

4. Said rules of the Chicago Board of Trade were competent and material evidence without regard to the fact that Hansen had actual knowledge of them, and the further fact that his long continued business transactions upon, and acquaintance with said Board, made him chargeable with knowledge of said rules.

The Supreme Court of Illinois has said in regard to the rules of the Chicago Board of Trade, and their binding effect upon a principal who deals on that board, through an agent, a member thereof: "A person dealing at a partic-" "ular market will be taken to have dealt according to the" "known general custom and usage of that market, and if" "he employs another to act for him in buying and selling" "at such market, he will be held as intending that the" "business should be conducted according to such general" "usage, and custom of such market; and this has been" "held to be the rule whether he in fact knows of the" "custom or not. Bailey vs. Bensley 87 Ill. 556; Doane" "vs. Dunham, 79 Ill. 131; Lyons vs. Culbertson, 83 Ill. 33;" "Lonergan vs. Stewart, 55 Ill. 44; Home Ins. Co. vs." "Favorite, 46 Ill. 263; Lawson On Usages, 47, 284-287."

Samuels vs. Oliver, 130 Ill. 73, 79.

Upon the trial of an action brought by agents, members of the Chicago Board of Trade, against their principal, for services rendered, and advances made in purchases and

sales of property on that board, and closed out by them, because he failed to keep his margins good, they offered in evidence the usages and custom of said board of offsetting or substituting one contract for another; of guaranteeing his principal's contract, and of not disclosing his principal's name by the agent; of closing out contracts, on the principal's default in advancing margins, not by the sale of the identical contract defaulted on, but by buying or selling a corresponding amount of property; and of the defendant principal's familiarity with such usage and custom of said board, at the time of the purchases and sales there in question in the suit by his said agents. The Appellate Court of Illinois ruled said evidence competent and material, and *said*: "A person who deals in a par-" "ticular market must be taken to deal according to the" "known, general and uniform custom or usage of that" "market; and he who employs another to act for him at a" "particular place or market, must be taken as intending" "that the business to be done will be done according to" "the usage and custom of that place or market, whether" "the principal, in fact, knew of the usage or custom or" "not." The Court also *said*: "If the evidence offered had" "been admitted, it would have appeared that by a general" "and uniform custom upon the Board of Trade, settle-" "ments of this character were made, and another respon-" "sible seller of the same commodity substituted for the" "one originally furnished to the customer. It must be" "deemed that this custom was within the meaning and" "intention of appellants and appellée; that appellee had" "it in view when he employed appellants to make such" "purchases for him, and that it entered into and formed" "a part of the contract between the parties."

Oldershaw vs. Knoles, 4 Brad. (Ill. App.), 63, 71, 72.

(See also)

Oldershaw vs. Knoles, 6 Brad. (Ill. App.), 325.

The Appellate Court of Illinois, in a later case, *held*: That (following the cases of Oldershaw in 4 and 6 Bradwell, *supra*), knowledge by a principal of the rules of the Chicago board, concerning the offset or substitution of one contract for future delivery for another, made on that board, by his agent, a member thereof, is not necessary to make such rules binding upon him. That it is not the law, that if the principal have no knowledge of such rules, they are binding upon him, in so far as they regulate the *mode* of performing the contract entered into by him on said board, through his agent, but not in so far as they *change* the *intrinsic character* of such contract.

Curtis vs. Wright, 40 Ill. App., 491.

(See also)

Kirkpatrick vs. Adams, 20 Fed. Rep., 287.
Bailey vs. Bensley, 87 Ill., 556.
Lyon vs. Culbertson, 83 Ill. 33.
Thorne vs. Prentiss, 83 Ill. 99.
United States Life Ins. Co., vs. Advance Co., 80 Ill. 549.
Cothran vs. Ellis, 107 Ill. 413.
Sutton vs. Tatham, 10 Ad. & E. 27.

5. Said rules entered into and became a part of the contract of agency between Hansen and the Boyds, and so were admissible in evidence.

Bibb vs. Allen, 149 U. S. 481.
Lyon vs. Culbertson, 83 Ill 33.
Thorne vs. Prentiss, 83 Ill. 99.
Hostetter vs. Park, 137 U. S. 30.
Robinson vs. United States, 13 Wall. 363.
Renner vs. Bank of Columbia, 9 Wheaton, 582.
Bishop on Contracts, Sec. 449.

III.

The third error specified, (Rec. 18, Orig. 48), relates to the admission in evidence by the trial Court of certain regulations of the Clearing House of the Chicago Board of Trade. These regulations or rules, eleven in number, in the words and figures set forth in the record of this case, (Rec. 75-76, Orig. 129-131), were by plaintiffs proved to have been in full force and effect during all the times of the transactions in question on said board between Hansen and the Boyds. (Rec. 65, Orig. 114). Said regulations were offered in evidence by the plaintiffs, and by the Court "received subject to objection made to original offer" "and read in evidence" * * * * . (Rec. 75, Orig. 128-129). Such "original offer," and "objection made" thereto refer to the offer of, and objection to a copy of all the rules of the Board of Trade in the form of a book, referred to in Point II, *ante*, (Rec. 60, Orig. 107-108), and the objection may, therefore, be said to relate solely to the competency and materiality of said regulations in evidence. In this case as before in the case of the rules of the Board of Trade, these regulations were admitted

in evidence "subject to objection made to original offer," and no exception was taken to their admission, and no motion was subsequently made to exclude them.

> In error the Court can consider only objections and exceptions, specifically made and taken at the trial in the Court below, and they must affirmatively appear on the record.
>
> *Pomeroy's Lessee vs. Bank of Indiana, 1 Wall. 592.*
> *Stebbins vs. Duncan, 108 U. S. 32.*
> *Newport News Co. vs. Pace, 158 U. S. 36.*
> *United States vs. Breitling, 20 Howard 252.*

Assuming objection and exception to have been duly made, taken and recorded to the order of the Court below admitting these regulations in evidence, and error duly assigned so that this Court can now review that order, the same was not in error, and said rules were competent and material evidence. Sections 6, 7, 8 and 9 of Rule XXII of said Board of Trade (Rec. 71-74, Orig. 123-128) provide for the establishment of a clearing house of said Board of Trade for the settlement of contracts for future delivery, and, in a general way the manner of settlement, authorize settlement of such contracts through such clearing house, and under its rules and regulations; authorize the board of directors of said Board of Trade "to establish rules and regulations governing" "the exchange clearing house of this association, and to change, add to," "or modify such regulations from time to time," (Sec. 9); and provide that, "in case any member of this association, acting as a commission" "merchant, shall have made purchases or sales by order and for ac-" "count of another, whether the party of (*for*) whom such purchase and" "sale was made be a member of this association or not, such order shall" "be deemed to have been made with reference to, and to be executed" "and carried out in all respects under the rules, regulations and cus-" "toms of this association (including the Exchange Clearing House" "Regulations) the same as though they were in terms incorporated" "into such order." (Sec. 9). The regulations in question, therefore, are simply means for the practical enforcement of the more general provisions of said sections of said Rule XXII; they are in fact only more particular provisions of said rule. And they are admissible in evidence

for the same reasons and upon the same authorities that said rule itself was admissible in evidence, as shown under Point II *ante*, to which the Court are respectfully referred.

IV.

The fourth and fifth errors specified (Rec. 18, Orig. 48) relate to the admission in evidence by the trial Court of certain testimony of the witness, James E. Boyd, one of the plaintiffs, "in explanation of the" "manner in which the transaction in controversy were conducted, and" "carried out under and in pursuance of the rules of the Board of Trade" "of Chicago" (fourth specification of error); and "in explanation of the" "manner and fact in which the payment of losses and profits accruing" "under the various transactions involved in this action were made to," "received from and adjusted by the Chicago Board of Trade Clearing" "House." (fifth specification of error).

1. What this testimony is these assignments of error do not specify; they do not "quote the full substance of the evidence admitted or rejected." These alleged errors will not be reviewed by this Court.

> "When the error alleged is to the admission or to the" "rejection of evidence, the specification shall quote the" "full substance of the evidence admitted or rejected." * * * * * * * * * "And errors not specified accord" "ing to this rule will be disregarded".

Rule 21 of the Supreme Court of the United States.

2. The testimony probably referred to in the fourth specification of error is to be found in the record on pages 77, 78 and 79 (Orig. 132-136), beginning with the words on said page 77: "Q. Will you state what" "you did as a commission merchant acting for Hansen, the defendant" "in this action, in any one of these transactions—what you did for him" "—what you performed for him on the Board of Trade" * * * and ending with the words "A. Yes, sir" at the foot of said page 79.

There was no objection made to the offer or exception taken to the admission by the trial Court of this testimony, and its ruling in this regard cannot be reviewed here.

> In error the Court can consider only objections and exceptions specifically made and taken at the trial in the Court below; and they must affirmatively appear on the record.

Pomeroy's Lessee vs. Bank of Indiana, 1 Wall. 592.
Stebbins vs. Duncan, 108 U. S. 32.
Newport News Co. vs. Pace, 158 U. S. 36.
United States vs. Breitling, 20 Howard 252.

3. The testimony probably referred to in the fifth specification of error is in part the testimony to be found in the record on pages 80, 81 and 82 (Orig. 135-138), beginning with the words on said page 80: "Q. "Will you explain a little more fully than you did the manner in which" "these losses are paid through the Clearing House—what is the Clear-" "ing House? Objected to, the Rules of the Clearing House being the" "best evidence. The Court: I think he may explain about it;" and ending with the words: "Q. These sheets refer to transactions made" by brokers? A. Yes, sir" on said page 82.

No objection or exception was made or taken to the ruling of the trial Court in admitting this testimony, and its ruling cannot be reviewed here.

Pomeroy's Lessee vs. Bank of Indiana, 1 Wall. 592.
Newport News Co. vs. Pace, 158 U. S. 32.

The testimony probably referred to in the fifth specification of error is also, in part, the testimony to be found in the record on pages 76 and 77 (Orig. 131-132) beginning with the words on said page 76: "I wish" "you would state the manner in which trades are settled, if you know," "losses paid or profits collected through the clearing house system of" "the Board. Objected to as immaterial, incompetent and irrelevant." "Objection overruled. Defendant excepts;" continuing with the words on said page 77: "Q. All the moneys in the various statements that" "have been rendered to Hansen, where there was a loss you paid it to" "the clearing house, and where there was a profit you received it from" "the clearing house? Objected to as immaterial, incompetent and" "irrelevant. Objection overruled. Defendant excepts;" and ending with the words on said page 77: "A. Yes, sir; every one of those" "transactions went through the clearing house."

4. Assuming that the testimony referred to in the fourth and fifth specifications of error was all duly objected to, exception to its admission duly taken, and that error in reference thereto is duly assigned, the same is competent, material and relevant evidence in this case. It is

evidence directly tending to prove the particular *acts* of the Boyds as the agents of Hansen, in executing his orders for the purchase and sale of grain on the Chicago Board of Trade, under its rules and regulations, on which acts this action for services rendered and money paid and advanced is based. What the Boyds *did* in executing Hansen's orders, how their transactions for him were step by step customarily carried through the Board of Trade and its clearing house under the rules and regulations thereof constituted the very pith of this action. It

> "was competent and relevant to prove that the contract"
> "between the parties had been carried out on the part of"
> "the plaintiffs in the mode and according to the methods"
> "contemplated by the parties"

viz: under the rules and regulations of the Board of Trade and its clearing house. The evidence was admissible for the reason that it tended to show the particular acts of the Boyds in behalf of Hansen, and also for the same reasons and upon the same authorities that said rules of said Board of Trade were admissible as shown under Point II *ante*, to which the Court are respectfully referred.

> In the Bibb case, *supra*, it was claimed, "that the Court"
> "erred in admitting as evidence the statutes of New York,"
> "under which the New York Cotton Exchange was incor-"
> "porated, and the rules and regulations of the Exchange,"
> "together with the *parol testimony* that the transactions in"
> "question between the parties were conducted in accord-"
> "ance with those rules and regulations." This Court held such parol testimony admissible, in the words above quoted, and "germane to the issues in the case."
>
> *Bibb vs. Allen, 149 U. S., 481, 486, 489.*

V.

The sixth error specified (Rec. 18, Orig. 49) relates to the refusal of the trial Court to instruct the jury to return a verdict for the defendant at the close of the plaintiffs' testimony and case. This alleged error cannot be reviewed by this Court, because the plaintiff in error, after a motion for a directed verdict in his favor made by him in the Court below, at the close of the plaintiffs' testimony, had been overruled and exception duly taken, did not rest his case on such testimony, but went on with his defense, put in testimony of his own, did not renew the motion when all the testimony in the case was taken, and the case

closed, made no other motion which would exclude such testimony or take the case from the jury, made no other exception to the submission of the case to the jury, but submitted to the Court a request to charge, which the Court gave to the jury in full, and in the language requested. (Rec. 110, Orig. 175; Rec. 110-113, Orig. 176-180; Rec. 145, Orig. 223; Rec. 17, Orig. 44c.)

> The refusal to instruct the jury, at the close of plaintiffs testimony, to find for the defendant cannot be assigned for error, where the defendant afterwards introduced evidence in his own behalf. If, at the close of the plaintiff's testimony, the defendant moves for a directed verdict, and the motion is denied, and to the denial of which he duly excepts, and thereafter he does not rest his case on such testimony, but goes on with his defense, and puts in testimony of his own, he waives the exception, and cannot insist upon it as error in this court.
>
> *Grand Trunk Ry. Co. vs. Cummings, 106 U. S. 700.*
> *Accident Ins. Co. vs. Crandall, 120 U. S. 527.*
> *Northern Pacific Ry. Co. vs. Mares, 123 U. S. 710.*
> *Union Iron Co. vs. Smith, 124 U. S. 405.*
> *Robertson vs. Perkins, 129 U. S. 233.*
> *Columbia & P. S. R. Co. vs. Hawthorne, 144 U. S. 202.*
> *Bogk vs. Gassert, 149 U. S. 17.*
> *Wilson vs. Haley Live Stock Co., 153 U. S. 39.*
> *Runkle vs. Burnham, 153 U. S. 216.*
> *Pacific Mutual Life Ins. Co. vs. Snowden, 12 U. S. App. 705.*

VI.

The seventh error specified (Rec. 18, Orig. 49) relates to the statement of the trial Court in its charge to the jury, that what the term, "scalps," means "has not been developed by the testimony." The plaintiffs' witness, Handy, who was the agent of the Boyds at Minneapolis, and negotiated their contract of agency with Hansen, testified that in a certain conversation with him the term "scalps" might have been used, but he would not swear to it, (Rec. 41-42, Orig. 85-86), while Hansen himself testified that the term "scalps" was used in such conversation. (Rec. 112, Orig. 177-178). And Hansen further testified as follows: "Q. Now you have stated about the conversation between"

"you and Mr. Handy and you made use of a word that we don't under-"
"stand; you said Mr. Handy said it was a good time to make a few"
"scalps; what do you mean by the word 'scalps'? A. That word is"
"used on exchange frequently when they mean taking a short time,"
"buy and sell as quick as you see a profit, and when you have a loss"
"close it out at any moment. Q. At a loss? A. Yes, sir; at a loss or"
"at a profit; taking it out and closing it out when you can get a small"
"profit. Q. Suppose you have a gain? A. You can take it in at any"
"time you want to. Q. Then a scalp means a short deal that is closed"
"out in a short time? A. Yes, sir. Q. To be taken in a short time?"
"A. Yes, sir."

"The Court: Do you mean that you sell May wheat, and that you"
"had previously bought May wheat, and that it was settled before May?"
"A. Yes, sir" (Rec. 114-115, Orig. 181.) This is the only evidence concerning the word "scalps" appearing in the record.

1. The part of the trial Court's charge here complained of contains no proposition of law. The trial Court did not tell the jury that there was no evidence in the case defining the term, "scalps." It only declared what is true, viz: That the testimony does not fully develop the meaning of the term "scalps;" and so the trial Court held in denying a motion for a new trial in this case, when this same alleged error was urged. The Court in its memorandum said: (Rec. 17, Orig. 44 C.)

> "It is urged that the jury were misled by a statement"
> "in the charge that the word "scalps," used by the agent"
> "of the defendants before the defendant authorized him"
> "to enter into any contracts for the purchase or sale of"
> "wheat, misled the jury."
>
> "Hansen, the defendant, testified, in substance, that in"
> "the latter part of July, 1888, the manager of the plain-"
> "tiff at Minneapolis was introduced to him by a certain"
> "Mr. George Shepherd, who said, 'I used to have a few"
> "deals in options, and when I was trading with him I had"
> "never made a loss,' and that the next day after the in-"
> "troduction the manager spoke to him in the Chamber of"
> "Commerce building, in Minneapolis, and said that 'he"
> "knew I had some trades a year ago, and they had"
> "roasted me pretty hard then, but he thought it was a"
> "good chance to make something back this fall by mak-"
> "ing some 'scalps'". On cross-examination, witness, on"
> "being asked 'What do you mean by the word 'scalp?'"
> "said the word was used on exchange frequently when"
> "they mean 'taking a short time, buy and sell as quick as"
> "you see a profit, and when you have a loss close it out at"
> "any moment.' 'A scalp means a short deal'."

"The meaning of the word is not fully disclosed by this"
"testimony, nor is it revealed by the answer to a ques-"
"tion of the Court, when the witness in substance said that"
"an example of a 'scalp' was when a dealer having pre-"
"viously bought wheat to be delivered in May sold the"
"same quantity to be delivered the same month and set-"
"tled his deals before May. I do not think any substan-"
"tial error was committed in view of such evidence."

2. The trial Court's statement to the jury, that what the term, "scalps" means has not been developed by the testimony, is the statement of a fact, or a conclusion of fact from the Court's recollection of the evidence. It is a minor fact, and not material. The Court fully submitted to the jury, on all the facts and evidence, the broad question whether the transactions in controversy were wagering under the statutes of Illinois. (Rec. 139-146, Orig. 215-225).

When no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the jury, an expression of opinion upon the facts by the Judge in his charge is not reviewable error.

Rucker vs. Wheeler, 127 U. S. 85.
Transportation Line vs. Hope, 95 U. S. 297.

3. The alleged error, if error at all, is harmless, immaterial, and caused no prejudice to plaintiff in error, and is not ground for reversal.

"No judgment should be reversed in a Court of error"
"when it is clear that the error could not have prejudiced,"
"and did not prejudice the rights of the party against"
"whom the ruling was made."

Lancaster vs. Collins, 115 U. S., 222, 227.

A judgment will not be set aside because the charge of the court may be open to some verbal criticism, which could not have misled a jury of ordinary intelligence.

Chicago & N. R. R. Co. vs. Whitton, 13 Wall., 270, 291.

Where a verdict was so obviously right that no other result could be obtained, the judgment will not be set aside for technical inaccuracies in the charge.

Walbrun vs. Babbitt, 16 Wall., 577, 580.

Where, in the charge to the jury, there was no material error to the injury of the party excepting, the Court will not consider whether the language used in the charge was technically accurate.

Henderson Bridge Co. vs. McGrath, 134 U. S., 260, 276.

Where, taking all of the instructions of the Court to the jury together, they conform to the well settled law, and there is no ground for supposing that the jury has been misled, the judgment will not be reversed by reason of the instructions.

Stewart vs. Wyoming Cattle Ranche Co., 128 U. S., 383, 388.

VII.

The eighth error specified (Rec. 19, Orig. 49) relates to that part of the trial Court's charge to the jury in words as follows: "It is claimed" "on the part of the plaintiffs that he was informed of the rate of com-" "mission for their services; that the contracts made for him would be" "subject to the rules, usages and regulations of the Chamber of Com-" "merce of the city of Chicago, and that in all cases actual wheat must" "be purchased and sold and the margins kept up to protect them" "against loss."

1. This part of the Court's charge should be read in connection with that part of its charge following it, and forming a part of its immediate context: "The defendant testifies that no particular agreement as to" "how the business was to be conducted was made at the time of his" "interview with the manager in Minneapolis, in August." (Rec. 140, Orig. 215).

2. These several claims of the plaintiffs, as stated by the trial Court, were abundantly sustained by the evidence in the case. (Rec. 27, Orig. 63-64; Rec. 41-44, Orig. 85-89; Rec. 126, Orig. 195).

3. The part of the trial Court's charge here complained of contains no proposition of law. The Court's statement of what the plaintiffs claimed is correct. It contains no intimation as to whether their claims were sustained by the evidence. The determination of that was left to the jury by the Court's entire charge. (Rec. 139-146, Orig. 214-226.)

An instruction to the jury, which is only a correct statement of the claims of the parties, without an intimation as to whether either claim was sustained by the evidence, is not ground for reversal.

Wilson vs. Everett, 139 U. S. 616.
Bogk vs. Gassert, 149 U. S. 17.

VIII.

The tenth error specified (Rec. 19, Orig. 50), relates to that part of the trial Court's charge to the jury in words as follows: "The plaintiffs' " "theory is, and evidence has been introduced tending to sustain it, that" "they were employed by defendant, through the Minneapolis office, as" "brokers and commission merchants, to purchase or sell wheat, for future" "delivery, on his account, and that such sales and purchases were to be" "made on the Chicago Board of Trade with the members thereof; that" "such contracts were to be governed by the rules and usages of such" "chamber of commerce, and that in every instance actual delivery of" "wheat was intended by the parties to the contracts made for the de-" "fendant's account, and that these contracts were closed and settled up" "by the plaintiffs in accordance with these terms and at the defend-" "ant's request, and advances were made and their own money paid out" "for his benefit."

1. This portion of the trial Court's charge should be read in connection with that part of its charge immediately preceding it and forming a part of its immediate context: "The chief controversy in this case is" "about the character of the transactions between the plaintiffs and the" "defendant, which is the basis of this suit. It is urged by the defend-" "ant that all these transactions were wagers, and that no wheat was" "ever in any instance intended to be received or delivered by him, and" "that the plaintiffs so understood it, and that the evidence and the re-" "ports of sales and statements made to him show that fact, and that" "these transactions were in violation of the statutes of the State of" "Illinois, which were read to you by counsel for the defendant." (Rec. 141, Orig. 216.)

2. The part of the trial Court's charge here complained of contains no proposition of law. The theory or claims of the plaintiffs as here stated by the Court are abundantly sustained by the evidence. (Rec. 125-127, Orig. 194-198; Rec. 26-27, Orig. 63-65; Rec. 41-43, Orig. 84-89; Rec. 29-32, Orig. 66-71; Rec. 113-117, Orig. 179-184; Rec. 54-55, Orig. 100-101.)

3. The trial Court's statement of what the plaintiffs' theory was, or what their claims in the case were, is correct. It contains no intimation as to whether such theory or claims were sustained by the evidence. The determination of that was left to the jury by the Court's entire charge. (Rec. 139-146, Orig. 214-226).

> An instruction to the jury, which is only a correct statement of the claims of the parties, without an intimation as to whether either claim was sustained by the evidence, is not ground of reversal.
>
> *Wilson vs. Everett, 139 U. S. 616.*
> *Bogk vs. Gassert, 149 U. S. 17.*

IX.

The eleventh error specified (Rec. 19, Orig. 50), relates to that part of the charge of the trial Court to the jury in words as follows:

"All optional contracts, however, are not illegal under the statute" "which was read to you. If the option is to sell or purchase at a future" "time, then it is illegal and a wager; but if the option consists merely" "of a delivery within a specified time, the contract is valid, and what" "was done by putting up margins amounts to nothing unless the con-" "tract itself is illegal. The validity of an option contract depends upon" "the mutual intention of the parties thereto, and if a sale or purchase" "of actual wheat for future delivery is intended, it is valid. If the" "contract is lawful, the putting up of margins to cover losses which" "might accrue from fluctuations in prices in final settlement of the" "transactions, according to the rules and usages of the board of trade" "of the City of Chicago, is entirely proper and legitimate. These rules" "have been read to you by counsel for plaintiffs, and there is nothing" "in those rules on their face that indicates that they are in violation of" "the laws of Illinois or contrary to public policy".

> 1. This specification of error "does not set out separ-" "ately and particularly each error asserted and intended" "to be urged", and should for that reason be disregarded by the Court.

Rule 21 of the Supreme Court of the United States.

2. The part of the trial Court's charge here complained of contains several distinct and unrelated propositions of law, and but one exception thereto.

"It was long ago determined that it is the duty of coun-"
"sel excepting to propositions submitted to a jury to ex-"
"cept to them distinctly and severally, and that where"
"they are excepted to in mass, the exception will be over-"
"ruled, provided any of the propositions be correct."

Newport News & Miss. Valley Co. vs. Pace, 158 U. S. 36, 37.
Baltimore & P. R. Co. vs. Mackey, 15 Supreme Court Reporter, 491, 497.

3. The following statement in said part of said charge contains a a proposition of law that is correct, and relevant to the issues and evi-" dence in the case: "All optional contracts, however, are not illegal" "under the statute which was read to you. If the option is to sell or" "purchase at a future time, then it is illegal and a wager; but if the" "option consists merely of a delivery within a specified time, the con-" "tract is valid."

This, it is submitted, is the settled construction, in both the Federal courts and the courts of the State of Illinois, of the statute referred to, and is a statement of the settled law.

As to the proper construction of Sec. 130, Chap. 38, of the Revised Statutes of Illinois (Rec. 111, Orig. 176), see the following cases:

White vs. Barber, 123 U. S., 392.
Gilbert vs. Gaugar, 8 Biss., 214.
Tenney vs. Foote, 95 Ill 99.
Tenney vs. Foote, 4 Brad. (Ill. App.) 594.
Soby vs. The People, 134 Ill., 66.
Schneider vs. Turner, 130 Ill., 29.
Schneider vs. Turner, 27 Ill., App. 220.
Logan vs. Musick, 81 Ill., 415.
Webster vs. Sturges, 7 Brad. (Ill. App.), 560.
Corcoran vs. Coal Co., 37 Ill. App., 577.
Stock Exchange vs. Mellen, 27 Ill. App., 556.
Armstrong vs. Bank, 133 U. S., 433.

That contracts, optional to sell or purchase at a future time, are illegal, and contracts optional only as to time of delivery are legal, see the following cases:

White vs. Barber, 123 U. S., 392.
Jackson vs. Foote, 12 Fed. Rep., 37.
Union Bank vs. Carr, 15 Fed. Rep., 438.
Cole vs. Milmine, 88 Ill., 349.
Logan vs. Musick, 81 Ill., 415.
Pickering vs. Cease, 79 Ill., 328.
Pixley vs. Boynton, 79 Ill., 351.
Wolcott vs. Heath, 78 Ill., 433.
Webster vs. Sturges, 7 Brad. (Ill. App.), 560.

4. The following statement in said part of said charge contains a proposition of law that is correct, and relevant to the issuses and evidence in the case: "The validity of an option contract depends upon" "the mutual intention of the parties thereto, and if a sale or purchase" "of actual wheat for future delivery is intended, it is valid." This, also, is settled law.

That the validity of an option contract depends upon the mutual intention of the parties thereto, see the following cases.

Embrey vs. Jemison, 131 U. S., 336.
Melchert vs. Telegraph Co., 11 Fed. Rep. 193.
Union Bank vs. Carr, 15 Fed. Rep. 438.
Williar vs. Irwin, 11 Biss. 57.
Irwin vs. Williar, 110 U. S. 499.
Logan vs. Musick, 81 Ill. 415.
Miles vs. Andrews, 40 Ill. App. 155.
Mohr vs. Miesen, 47 Minn., 229.
Coffman vs. Young, 20 Brad. (Ill. App.) 76.

5. The following statement, in said instruction, contains a proposition of law that is correct, and relevant to the issues and evidence in the case: "What was done by putting up margins amounts to nothing" "unless the contract itself is illegal. * * * * If the contract is" "lawful, the putting up of margins to cover losses which might accrue" "from fluctuations in prices in final settlement of the transactions, ac-" "cording to the rules and usages of the Board of Trade of the city of" "Chicago, is entirely proper and legitimate."

In support of this proposition see the following cases:

Union Bank vs. Carr, 15 Fed. Rep. 438.
Lehman vs. Feld, 37 Fed. Rep. 852.
Perrin vs. Parker, 126 Ill. 201.
Corbett vs. Underwood, 83 Ill. 324.
Moeller vs. McLagan, 60 Ill. 317.

"Margin is *a collateral security*, usually in money, depos-"
"ited with a broker to secure him from loss on contracts"
"entered into by him on behalf of his principal."

Biddle on Stock Brokers, ps. 71, 377, 378.

The plaintiffs' witness, Handy, testified that he told defendant, Hanson, that he must keep his margins good so as to keep the Boyds secure on contracts for future delivery of grain made by them for him. (Rec. 27, Orig. 63; Rec. 41, Orig. 85). Hansen himself testified that he understood that he had to furnish his brokers margins on his purchases and sales when he ordered them made; that the margin was the amount of money he would have to put up in making a purchase of wheat; that he agreed to keep his margins good. (Rec. 126, Orig. 195). James E. Boyd testified that the Boyds advanced to other brokers large sums of money as margins to secure the performance of contracts made with them for Hansen. (Rec. 92, Orig. 151).

6. The following statement in said part of said charge contains a proposition of law that is correct, and relevant to the issues and evidence in the case: "There is nothing in those rules on their face that" "indicates that they are in violation of the laws of Illinois or contrary" "to public policy."

That this is true admits of no question. These rules have many times come up for consideration before the Courts of Illinois, and the Federal Courts. Out of the many cases that might be cited, see the following:

Higgins vs. McCrea, 116 U. S. 671.
Corbett vs. Underwood, 83 Ill. 324.
Curtis vs. Wright, 40 Ill. App. 491.
Samuels vs. Oliver, 130 Ill. 73.

X.

The twelfth error specified (Rec. 20, Orig. 51) relates to that part of the charge of the trial Court to the jury in words as follows:

"Courts, however, must recognize from necessity the methods of car-"
"rying on business at the present day and apply well-settled principles"
"of the common law to enforce contracts unless they are forbidden by"
"statute or violate some rule of public policy. The daily mercantile"
"business of the country, mercantile deals—and by that I mean the"
"sale and purchase of personal property—could not be successfully"
"carried on if merchants and dealers were unable to sell something"
"which they did not have but which they intended to get in the market"
"and buy before the day of delivery. A trader has a right to sell, to"
"deliver at some future time, that which he then has not, but which"
"he expects to go into the market and buy; and the parties may agree"
"mutually that there need not be a present delivery, but that such de-"
"livery may take place at some other time. Such future delivery con-"
"tracts, however, must be in good faith; there must be an intention to"
"make an actual sale and delivery of the article dealt in."

1. The following statement in said part of said charge contains a proposition of law that is correct and relevant to the issues and evidence in the case:

"The daily mercantile business of the country, mercantile deals—"
"and by that I mean the sale and purchase of personal property—could"
"not be successfully carried on if merchants and dealers were unable to"
"sell something which they did not have but which they intended to"
"get in the market and buy before the day of delivery. A trader has"
"a right to sell, to deliver at some future time, that which he then has"
"not, but which he expects to go into the market and buy; and the"
"parties may agree mutually that there need not be a present delivery,"
"but that such delivery may take place at some other time."

This statement of the law admits, at this day, of no question. It is the common law, the law as laid down by this Court.

Hibblewhite vs. McMorine, 5 M. & W. 462.
Bibb vs. Allen, 149 U. S. 481.
Embrey vs. Jemison, 131 U. S. 336.
Irwin vs. Williar, 110 U. S. 499.
Jackson vs. Foote, 11 Biss. 223 and note.

Clarke vs. Foss, 7 Biss. 540.
Logan vs. Musick, 81 Ill. 415.
Sanborn vs. Benedict, 78 Ill. 309.
Edwards vs. Hoeffinghoff, 38 Fed. Rep. 635.
Porter vs. Viets, 1 Biss. 177.

2. The following statement in part of said charge contains a proposition of law that is correct, and relevant to the issues and evidence in the case: "Such future-delivery contracts, however, must be in good" "faith; there must be an intention to make an actual sale and delivery" "of the article dealt in."

This likewise is settled law. See the following cases.

Pearce vs. Rice, 142 U. S. 28.
Embrey vs. Jemison, 131 U. S. 336.
White vs. Barber, 123 U. S. 392.
Irwin vs. Williar, 110 U. S. 499.
Melchert vs. Telegraph Co., 11 Fed. Rep. 193 and note by Mr. Francis Wharton.
Jackson vs. Foote, 12 Fed. Rep. 37.
Jackson vs. Foote, 11 Biss. 223 and note.
Bartlett vs. Smith, 13 Fed. Rep. 263.

XI.

The thirteenth error specified relates to a part of the charge of the trial Court set out in the record (Rec. 20-22, Orig. 52-54), and too extended for insertion here at length.

1. This specification of error "does not set out separ-" "ately and particularly each error asserted and intended" "to be urged," and should for that reason be disregarded by the Court.

Rule 21 of the Supreme Court of the United States.

2. The part of the trial Court's charge complained of contains several distinct and unrelated propositions of law, and but one exception thereto.

"It was long ago determined that it is the duty of coun-" "sel excepting to propositions submitted to a jury to ex-"

"cept to them distinctly and severally, and that where"
"they are excepted to in mass, the exception will be over-"
"ruled, provided any of the propositions be correct."

Newport News & Miss. Valley Co. vs. Pace, 158 U. S. 36, 37.
Baltimore & P. R. Co. vs. Mackey, 15 Supreme Court Reporter, 491, 497.

3. (1). The evidence in the case abundantly sustains the following statement in said part of said charge: "The theory of the plaintiffs is" "that they were brokers and agents appointed by the defendant to" "transact business in good faith for the purchase and sale of wheat for" "future delivery, and that they did so, and that all these little memo-" "randa of the transactions at various times upon the chamber of com-" "merce between these plaintiffs and other parties, members of that" "chamber, as evidenced by these papers offered in evidence, attached" "to the depositions, were contracts for the actual delivery of wheat," "and they were sales and purchases of wheat for future delivery." (Rec. 25-26 27, Orig. 60-64; Rec. 29, Orig. 66; Rec. 41-42-43, Orig. 85-89; Rec. 61, Orig. 108; Rec. 88, Orig. 145-146; Rec. 106-109, Orig. 170-174).

(2). This part of the Court's charge should be read in connection with that part of its charge immediately preceding it and forming part of its immediate context: "The theory of the defendant is that these" "transactions between the plaintiffs and himself were wagers. He in-" "sists that the arrangement which was made, as far as his intention" "was concerned, with the plaintiffs was merely betting upon the future" "price of wheat, and he claims that the testimony of the contracts" "themselves, and the reports which were rendered him, and the corres-" "pondence show that such was the intention of the plaintiffs, and that" "both parties knew and understood that these transactions were mere" "wagers, and that no wheat was to be delivered or received". (Rec. 142-143, Orig. 219).

(3). The trial Court's statement of what the plaintiffs' theory was, or what their claims in the case were, is correct. It contains no proposition of law, and no intimation as to whether the plintiffs' claims were sustained by the evidence. The determination of that was left to the jury by the Court's entire charge. (Rec. 139-146, Orig. 214-226).

An instruction to the jury, which is only a correct statement of the claims of the parties, without an intimation as to whether either claim was sustained by the evidence, is not ground for reversal.

Wilson vs. Everett, 139 U. S. 616.
Bogk vs. Gassert, 149 U. S. 17.

4. (1). The following statement in said part of said charge is supported by the evidence and contains a correct proposition of law: "If "you believe that the plaintiffs were employed by the defendant as" "brokers to buy and sell wheat, and the contracts and memoranda" "which have been offered in evidence were upon their face contracts" "for the sale and purchase of wheat for future delivery, and the plain-" "tiffs conducted this business for defendant's account, and at his request" "advanced money on said contracts, which is this indebtedness sued" "for, then the burden of proof is upon the defendant to show, by a pre-" "ponderence of evidence, to your satisfaction, that these contracts were" "wagers."

This is a concise and sufficiently broad statement of the facts necessary to be proved by the plaintiffs to make out a *prima facie* case. That the evidence in the case proved or tended to prove these facts there can be no question made upon the record. The jury were told that if from the evidence they believed these facts to have been proved, then the *onus* was on the defendant to prove by a preponderance of the evidence, satisfactory to the jury, that these contracts were wagers.

This is a correct statement of the law.

Bibb vs. Allen, 149 U. S. 481.
Irwin vs. Williar, 110 U. S. 499.
Kirkpatrick vs. Adams, 20 Fed. Rep. 287.
Ward vs. Vosburgh, 31 Fed. Rep. 12.
Bangs vs. Hornick, 30 Fed. Rep. 97.
Lehman vs. Feld, 37 Fed. Rep. 852.
Williar vs. Irwin, 11 Biss. 57.
Pixley vs. Boynton, 79 Ill. 351.
Benson vs. Morgan, 26 Ill. App. 22.
1 Chitty on Pleading p. 221 (Star paging.)
Walker vs. Collins, 19 U. S. App. 307, 313.
Tuller vs. Talbot, 23 Ill. 298, 300 (orig. ed. 357).
Lemon vs. Chanslor, 68 Mo. 342.
Dunbar vs McGill, 64 Mich. 676.
2 Thompson on Trials, Sec. 1776.
Hocum vs. Weitherick, 22 Minn. 152, 155.

5. The following statements in said part of said charge are supported by the evidence and are true in law:

"On the other hand, if you believe the evidence shows that the plain-" "tiffs, acting as the defendant's brokers in the sale and purchase of" "wheat, entered into *bona fide* contracts for the actual sale and delivery" "of wheat with third parties, at his request, and subsequently settled" "losses and paid the amounts due under the contracts then they are" "entitled to a verdict and to recover the sums for this money paid out" "at his request. * * * *"

Also, "if you find that the plaintiffs were commission merchants of" "the city of Chicago and members of the Board of Trade in that city," "and they acted as the brokers of the defendant, and at defendant's re-" "quest and from time to time during the period in evidence here," "made in good faith the contracts read in evidence on the orders of" "the defendant, and that said contracts intended the actual delivery of" "wheat therein mentioned, and in settlement of the said contracts" "plaintiffs paid, laid out and expended money for defendant, they can" "recover in this action."

(1). The record shows that there was evidence in the case, which proved or tended to prove the things referred to in said statements by the trial Court. (Rec. 25-26-27, Orig. 60-64; Rec. 29, Orig. 66; Rec. 41-42-43, Orig. 85-89; Rec. 61-62-63, Orig. 108-112; Rec. 79, Orig. 134-135; Rec. 84-88, Orig. 141, 145, 146; Rec. 106-109, Orig. 170-174; Rec. 46-47, Orig. 92; Rec. 55, Orig. 100-101; Rec. 61-63, Orig. 109-112).

(2). The propositions of law contained in said statements are true and not open to question.

> Contracts for future delivery of grain or other property, entered into *bona fide* and without any mutual agreement, tacit or expressed, that they are not to be performed by delivery of the property or payment of the price, are valid; no subsequent agreement to settle them by the payment of differences can render them invalid, and the maker of such contracts is liable for the differences paid by the the broker in his behalf, as well as for the commissions of such broker.

Gilbert vs. Gaugar, 8 Biss. 214.
Sawyer vs. Taggart, 14 Bush. (Ky.) 727.
Clark vs. Foss, 7 Biss. 540, 558.
Miles vs. Andrews, 40 Ill. App. 155.

Melchert vs. Telegraph Co. 11 Fed. Rep. 193.
Union Bank vs. Carr, 15 Fed. Rep. 438.
Bartlett vs Smith, 13 Fed. Rep. 263.
Kirkpatrick vs. Adams, 20 Fed. Rep. 287.
Ward vs. Vosburgh, 31 Fed. Rep. 12.
Edwards vs. Hoeffinghoff, 38 Fed. Rep. 635.
Jackson vs. Foote, 11 Biss. 223.
Mohr vs. Miesen, 47 Minn. 229.

6. The following statement in said part of said charge is based upon evidence in the case, and is true in law: "So, if you find from the evi-" "dence that the plaintiffs were brokers or commission merchants in the" "city of Chicago, and members of the chamber of commerce of that" "city, and that at various times from August, 1888, up to June, 1889," "they received orders from the defendant to buy or sell wheat; and" "further, if you find from the evidence that the plaintiffs, acting in" "good faith, and in the belief that the defendant was sending said" "orders in good faith, made actual purchase and sales for said defend-" "ant, at his request, as ordered, and in such transactions laid out and" "expended money for the defendant for the purpose of such actual de-" "livery, then the plaintiffs are entitled to recover the amounts thus" "paid, laid out, and expended for the defendant and their commission."

(1). This statement is based upon evidence in the case. (Rec. 25, Orig. 61; Rec. 26, Orig. 62; Rec. 126-127, Orig. 196; Rec. 113-117; Orig. 179-184; Rec. 27, Orig. 63; Rec. 41, Orig. 84-85; Rec. 43, Orig. 87-88; Rec. 84; Orig. 141; Rec. 106, Orig. 170; Rec. 109, Orig, 174; Rec. 79, Orig. 135; Rec. 88, Orig. 145; Rule IV, Rec. 66, Orig. 115; Rec. 46-47 Orig. 92; Rec. 61-63, Orig.109-112).

(2). This statement is true in law.

Bibb vs. Allen, 149 U. S., 481.
Gilbert vs. Gauger, 8 Biss., 215.

7. The following statement in said part of said charge is based upon evidence in the case and true in law: "And, if you believe from the" "evidence that these plaintiffs, acting as the agents of the defendant," "entered into these contracts evidenced by these memoranda, and they" "were contracts for the purchase and sale of wheat, then such contracts"

"cannot be rendered illegal by the mere intention of the defendant"
"alone that he did not intend to deliver or receive the property. To"
"make such contract read in evidence void as a wagering or gambling"
"contract, each party to the contract must have designed and intended"
"at the time the contract was entered into, not to buy to receive the"
"property, but to settle their mere differences between the contract"
"price and the market price; and if you should find that the defend-"
"ant intended to gamble in wheat, and at no time to deliver or receive"
"the property and pay for it, and if you also find that the plaintiffs"
"were ignorant of such intention on the part of the defendant, and they"
"received these orders of the defendant to buy and sell, in good faith"
"and in doing so, incurred obligations for said defendant by said con-"
"tracts, and the contracts intended the actual delivery of wheat, and"
"plaintiffs paid money upon these contracts to adjust them for defend-"
"ant, then they are entitled to recover a verdict in this action."

(1). This statement is based upon evidence in the case. (See references to record Point XI, 6, (1), *ante*, and also Rec. 133, Orig. 205-206; Rec. 132, Orig. 203).

(2). This statement is true in law.

Bibb vs. Allen, 149 U. S. 481.
White vs. Barber, 123 U. S., 392.
Higgins vs. McCrea. 116 U. S., 671.
Irwin vs. Williar, 110 U. S., 499.
Roundtree vs. Smith, 108 U. S., 269.
Hentz vs. Jewell, 20 Fed. Rep., 592. (4 Woods C. C., 656).
Union Nat. Bank vs. Carr, 15 Fed. Rep., 438.
Bartlett vs. Smith, 13 Fed. Rep., 263-270.
Kirkpatrick vs. Adams, 20 Fed. Rep., 287.
Bangs vs. Hornick, 30 Fed. Rep., 97.
Ward vs. Vosburgh, 31 Fed. Rep., 12.
Lehman vs. Feld, 37 Fed. Rep., 852.
Edwards vs. Hoeffinghoff, 38 Fed. Rep., 635.
Clark vs. Foss, 7 Biss., 540.
Pixley vs. Boynton, 79 Ill., 351.
Powell vs. McCord, 121 Ill., 330.
Miller vs. Bensley, 20 Ill. App., 528.
Benson vs. Morgan, 26 Ill. App., 22.

8. The following statement in said part of said charge is true in law. "On the other hand, I would say to you that these memoranda which" "have been offered in evidence and the entries on the plaintiffs' books" "of these contracts are not conclusive evidence of their character. You" "are to determine what these contracts were; you are to determine" "them from the evidence in the case; you can look into the transac-" "tions themselves, as disclosed by the evidence, and determine" "from the facts and circumstances attending their making and the con-" "duct of the parties thereto, with reference to them, whether they are" "illegal within the rule laid down, or whether they are *bona fide* con-" "tracts for the purchase and sale of wheat to be delivered at a future" "time."

(1.) That this statement is true in law, see the following cases:

Embrey vs. Jemison, 131 U. S. 336.
Mohr vs. Miesen, 47 Minn. 229, 232.
Melchert vs. Telegraph Co., 11 Fed. Rep. 193.
Tenney vs. Foote, 95 Ill. 99.

(2.) This part of the trial Court's charge directs the jury to all the evidence in the case, direct and indirect, in deciding upon the legality of the transactions in question, and the intent of the parties thereto, and was certainly most favorable to the defendant. Moreover, an instruction requested by him was given in his own words by the trial Court to the jury, submitting to it on all the evidence the question of the legality of said transactions, and the intent of the parties thereto. (Rec. 145, Orig. 223.)

XII.

The fourteenth error specified (Rec. 22, Orig. 54) relates to that part of the trial Court's charge to the jury in words as follows:

"I might say to you here that if you find from the evidence that any" "of these contracts had been offset under the rules and regulations as" "prescribed by the Board of Trade of Chicago, offsets between persons" "and dealers connected with that Board through whom these plaintiffs" "operated, that is not evidence of their illegality. The mode of settle-" "ment of *bona fide* contracts for the sale of actual wheat does not affect"

"the validity of the contract if the original intention was to purchase," "receive, take and deliver the actual wheat at the time specified when" "the contracts were made."

1. This part of the Court's charge is to be read in connection with the entire charge, and especially in connection with that part immediately preceding it and forming part of the immediate context, viz: "On the other hand, I would say to you that these memoranda which" "have been offered in evidence and the entries on the plaintiffs' books" "of these contracts are not *conclusive evidence* of their character. You" "are to determine what these contracts were; you are to determine them" "from the evidence in the case; you can look into the tran-" "sactions themselves as disclosed by the evidence and determine from" "the facts and circumstances attending their making and the conduct" "of the parties thereto with reference to them whether they are illegal" "within the rule laid down or whether they are *bona fide* contracts for the" "purchase and sale of wheat to be delivered at a future time" (Rec. 144, Orig. 222); and also in connection with that part of the charge in words as follows: "The issues here presented in this case render it necessary for" "you to determine what was this contract. What was the character of" "this transaction entered into between the parties? If you should deter-" "mine from the evidence that there was to be no delivery under the" "contracts which have been testified to, and that the memoranda of-" "fered in evidence in the shape of these trading cards, as they have" "been called, and the contracts for sale and purchase of wheat were fic-" "titious and merely colorable, and made and executed as a cover for" "speculation in margins, and in case the price of wheat fell or rose in" "the market merely the difference was to be paid, and that that was" "the intention of both parties, then the contracts are in their nature" "wagers and illegal." (Rec. 142, Orig. 219.)

> A mere excerpt from a charge ought not to be wrested from its context and judged by itself without reference to other directions which may have been given by a trial Court, and in determining whether such excerpts are prejudicial or otherwise, the charge must be considered as a whole, and in connection with the pleadings and testimony.
>
> *Union Pacific Railway Co. vs. James, 12 U. S. App. 482.*

Where taking all the instructions of the Court to the jury together they conform to the well settled law, and there is no ground for supposing that the jury has been misled, the judgment will not be reversed by reason of the instructions.

Stewart vs. Wyoming Cattle Ranche Co., 128 U. S. 383.
Aetna L. Ins. Co. vs. Ward, 140 U. S. 76.

(2). This part of the Court's charge to the jury is true in law.

Gilbert vs. Gaugar, 8 Biss. 214.
Sawyer vs. Taggart, 14 Bush. (Ky.) 727.
Clark vs. Foss, 7 Biss. 540, 558.
Miles vs. Andrews, 40 Ill. App. 155.
Melchert vs. Telegraph Co., 11 Fed. Rep. 193.
Union Bank vs. Carr, 15 Fed. Rep. 438.
Bartlett vs. Smith, 13 Fed. Rep. 263.
Kirkpatrick vs. Adams, 20 Fed. Rep. 287.
Ward vs. Vosburgh, 31 Fed. Rep. 12.
Edwards vs. Hoeffinghoff, 38 Fed. Rep. 635.
Jackson vs. Foote, 11 Biss. 223.
Mohr vs. Miesen, 47 Minn. 229.

XIII.

The ninth and fifteenth errors specified may be considered together.

The ninth error specified relates to a part of the trial Court's charge to the jury in words as follows: "Now, if you find from the evidence" "that the plaintiffs, about April 29th, 1889, informed the defendant by" "letter that the forty thousand bushels of May wheat in question" "could be at that time changed to June wheat and that the" "defendant made no answer thereto, and if you further believe from" "the evidence that said May wheat was changed over into June, for" "and on account of the defendant, and that the plaintiffs rendered an" "account, a report and statement, to defendant that said change had" "been made, and the defendant received such report and statement and" "retained it and made no objections to said change of said May wheat" "to June, then such facts amount to and were a ratification on the part"

"of the defendant of the acts of the plaintiffs in making such change." (Rec. 19, Orig. 50).

This part of said charge should be read in connection with that part of said ~~part~~ charge immediately preceding it and forming part of its immediate context in words as follows: "The defendant * * * * testifies "that the only transactions of his, open and unsettled at the time, were a" "contract of 40,000 bushels of wheat for May delivery and one of 25,000" "bushels for July delivery. The first of these defendant claims was" "transferred without his orders from May to June wheat; and before" "proceeding to speak about the chief controversy in the case I will call" "your attention to this transaction. The testimony of the defendant is" "that he never gave any orders for or consented to such transfer, and" "that the plaintiffs, if they so made it, assumed the burden of the" "transaction. The evidence of the plaintiffs with regard to the author-" "ity to make the transfer on defendant's account is circumstantial; but" "evidence is introduced tending to show a ratification by the defendant of" "what had been done, not only by direct admission of the whole indebt-" "ness, a part of which is made up of losses on the contract transferred" "from May to June, but also by evidence that the defendant was in-" "formed of the fact of the transfer, and that a report and statement were" "made to him on the 29th day of April, when the change was made," "and that no objection was made to the correctness of the statement of" "account so made and rendered". (Rec. 140, Orig. 215-216).

The fifteenth error specified relates to a part of the trial Court's charge to the jury in words as follows: "The plaintiffs have introduced facts" "and circumstances tending to show that that order was given, and in" "addition to that they have introduced the testimony of witnesses who" "testify as to an admission on the part of the defendant that the ac-" "count was a correct account, and also that the account rendered was" "put in his hands in the neighborhood of the 29th of April, or there-" "abouts, and a letter was written in which he was informed of the" "change; that no reply was made by him; that an account was render-" "ed of the transaction; that he retained the account and had corres-" "pondence with the plaintiffs afterwards in regard to some other" "matters without mentioning or raising any objection to it, and that he" "gave no reply to the information contained in that letter. If you find" "from the evidence all these facts you are to say whether it did or did"

"not amount to a ratification. If the facts are true, then there is a" "ratification". (Rec. 22, Orig. 55).

This part of said charge should be read in connection with that part of said charge immediately preceding it, and forming a part of its immediate context in words as follows: "The pleadings in the case show" "the amount claimed to be due. If the contracts are not wagering con-" "tracts, as far as the amount that is actually due is concerned, it would" "depend upon whether you determined that there was a ratification of" "an act which was done by the plaintiffs, claimed to have been done" "without any order from the defendant. I have stated to you the law" "which will govern you in regard to the settlement of that question." "the defendant, given his own testimony, testifies as to no order having" "been made by him." (Rec. 145, Orig. 224).

Said parts of said charge referred to in the ninth and fifteenth specifications of error are based upon the evidence in the case, and are true in law.

A. They are based upon the evidence in the case.

On April 16th, 1889, the Boyds bought for Hansen, on the Board of Trade, Chicago, 40,000 bushels May wheat ("Exhibit 1-17," Rec. 38, Orig. 79; Rec. 26, Orig. 62; Rec. 39, Orig. 83; Rec. 25, Orig. 61). The plaintiffs' evidence proved, and Hansen, at the trial, admitted that the purchase of said 40,000 bushels May wheat was made by them upon his order, and that he authorized such purchase. (Rec. 26, Orig. 62; Rec. 126-127, Orig. 196; Rec. 29, Orig. 66; Rec. 113-117, Orig. 179-184; Rec. 119, Orig. 186-187; Rec. 117-118, Orig. 184-186; Rec. 102, Orig. 165.)

James E. Boyd testified that the Boyds never "changed" said 40,000 bushels May wheat to June wheat on their own responsibility and without Hansen's orders. (Rec. 65, Orig. 113.)

Hansen promised to advance and keep up sufficient margins to cover his trades (Rec. 27, Orig. 64; Rec. 41, Orig. 85; Rec. 112, Orig. 178; Rec. 125, Orig. 194; Rec. 126, Orig. 195); he admitted on the trial that long prior to April 29th, 1889, his margins were exhausted. (Rec. 130, Orig. 201.) The Boyds, at his request, had been advancing margins for him and extending to him a line of credit. (Rec. 127-128, Orig. 197-198; Rec. 92, Orig. 151; Rec. 138-139, Orig. 213). They called on him prior to April 29th, 1889, to pay up, and to keep his margins good. (Rec. 94, Orig. 154.) He kept trying to pay; did pay to them a portion of his debt; claimed to, and did have wheat in transit with which to pay

more; kept telling them he would pay them every cent of their advances for him if they would give him time (Rec. 102, Orig. 164; Rec. 99, Orig. 161; Rec. 100-101, Orig. 161-163; Rec. 95, Orig. 155); and through their leniency he was given further credit and carried along by them. (Rec. 99-100, Orig. 161.)

The custom and usage of brokers on the Chicago Board of Trade and its rules did not require a broker to close out his principal's trade when he failed to keep up his margins, although he might do so if the principal was not a responsible party. (Rec. 65, Orig. 113; Rec. 101, Orig. 163; Rec. 103, Orig. 165; Rec. 100, Orig. 161; Rec. 102, Orig. 164.) Hansen had a store, stock of goods, one elevator, two warehouses, and was a large merchant, (Rec. 123-124, Orig. 192-193). Prior to April 29th, 1889, he made to Brush, agent of the Boyds, a favorable statement of his assets, upon Brush's demand, paid up some margins to Brush, told him he would pay every cent if he lived. Brush considered him a responsible person and so reported him to the Boyds. (Rec. 100-101-102, Orig. 161-165). In the latter part of April Brush had a conversation with Hansen about selling his 40,000 bushles May wheat and buying the same quantity of June wheat. Brush asked him if he did not want to make the change, and he said he did not know. He did not say yea, or no. (Rec. 96-97, Orig. 157). On April 26th, 1889, Brush wrote to Hansen for instructions as to selling the 40,000 bushels of May wheat and buying the same amount of June wheat, telling him it would have to be done before the following Thursday. Hansen did not reply to this letter though he received it. (Rec. 120, Orig. 188). On April 29th, 1889, the Boyds sent to Hansen a telegram, defendant's "Exhibit 3," asking him if they should "change" his May wheat to June wheat, saying: "today is your last chance". (Rec. 96-97, Orig. 157). Hansen duly received this telegram but did not reply to it; such is his testimony in substance. (Rec. 118-119, Orig. 186). Thereafter, on said April 29th, 1889, having in view solely the interests of an absent principal, with whom they had tried to communicate about the matter and failed, the Boyds sold said 40,000 bushels of May wheat and bought a like quantity of June wheat for Hansen, and thereafter, on the same day, they notified him of the transaction, as he admits (Rec. 95, Orig. 154-155; Rec. 103, Orig. 166; Rec. 128, Orig. 198). On said April 29th, 1889, after said sale and purchase were made, the Boyds sent to Hansen a statement of account thereof,—plaintiffs' "Exhibit M," which was

duly received by him on that day or the next, as he admits, (Rec. 95, Orig. 155; Rec. 110, Orig. 175; Rec. 118, Orig. 185), and retained by him. He further admits that he never returned to the Boyds said statement of account, "Exhibit M"; that, although he was meantime communicating with the Boyds about other matters, he made no reply to said statement of account, and raised no objection to the same, or to the acts of the Boyds in "changing" said 40,000 bushels May wheat to June as therein set forth; that on June 10th, 1889, two days after the Boyds had closed out all of his wheat because of failure to keep up his margins, he came to Minneapolis to see them, was then and there presented by them with a final statement of account of his indebtedness to them, (Defendant's "Exhibit 1-19," Rec. 39, Orig. 81), containing the items of the sale of said May wheat and the purchase of said June wheat; that he then and there objected to said items, and that that was the first objection ever raised by him thereto, or to the acts of the Boyds in "changing" said May wheat to June wheat. (Rec. 128-129-130, Orig. 198-201).

The plaintiffs' evidence, however, clearly shows that Hansen never made any objection whatever, in any form, to them or to their agents, as to the "change" of said May wheat to June wheat, or as to the items thereof in said final statement of account; but that he received said statement, examined it, said he must have time for payment thereof, put it in his pocket, and walked away. (Rec. 104-105, Orig. 167-169; Rec. 138, Orig. 211-212).

At the time of the said 40,000 bushels of May wheat and the purchase of the same quantity of June wheat, Brush was endeavoring to have Hansen pay up the margins the Boyds had advanced for him, and close out the trade, which he neglected to do; and he then told Brush that if he was given time he would pay every cent of his indebtedness to the Boyds; he told Brush this at different times (Rec. 95, Orig. 155); he told him he was shipping wheat and had it in transit to pay the Boyds. (Rec. 100-101, Orig. 162-163). Brush told Hansen that *said June wheat* would be closed out at the end of the month (Rec. 95, Orig. 155), and on May 4th wrote him that the Boyds demanded an immediate settlement of his account. (Rec. 98, Orig. 159). Hansen had, in January, 1889, secured to the Boyds the money advanced as margins by them for him, by turning over to them three elevator receipts for wheat aggregating 9,472 bushels, owned by Hansen, and worth more than one dollar a

bushel (Rec. 28-29, Orig. 65-66; Rec. 131, Orig. 202; Rec. 134, Orig. 206; Rec. 135, Orig. 208). Hansen had, early in February, 1889, promised L. E. Murphy, agent of the Boyds, to ship wheat and turn over to them the proceeds thereof to the amount of $3,000, in part payment of their advances for him, they thereafter to retain said elevator receipts *to secure* their advances for him on any *future trades* he might make. (Rec. 138-139, Orig. 213-214). Hansen, pursuant to his promise to L. E. Murphy, had in March, 1889, shipped and sold wheat, and turned over the proceeds, $3,000, to the Boyds. (Rec. 121, Orig. 189; Rec. 129, Orig. 200; Rec. 122, Orig. 191; Rec. 95, Orig. 155; Rec. 99, Orig. 160; Rec. 131, Orig. 202; Rec. 134, Orig. 207; Rec. 135, Orig. 208; Rec. 39, Orig. 81). On May 17th, 1889, Hansen wrote to the Boyds a letter in which he referred to his shipment and sale of 4,000 bushels of wheat, and his payment of the money, $3,000, to them, and said: "The balance of the wheat will be shipped as soon as cars can be obtained. I'll ship it to G. B. Kirkbride & Co., Minneapolis, and they will turn over the proceeds to you the same way as was done with the first lot. The reason why I havn't shipped it before is this: that I have been expecting the market to improve a little so as to get as much money out of it as possible, which would be to your benefit as well as mine." (Rec. 129, Orig. 200; Rec. 121, Orig. 189: Rec. 131, Orig. 202). Thus at least 18 days after Hansen knew that said 40,000 bushels of May wheat had been "changed" to a like quantity of June wheat by the Boyds for his account, he writes this letter, in no way objecting to the "change," but promising to ship more wheat to pay their advances for him. Thereafter Hansen, as he had promised in his letter, did ship to Kirkbride & Co., Minneapolis, eight cars of wheat, containing altogether about 4,000 bushels, with orders to them to sell the same, and turn the proceeds over to the Boyds. This Kirkbride & Co. did, and and paid to the Boyds for Hansen on his said order on June 5th, 1889, $1,252.86; on June 5th, 1889, $310.84; on June 6th, 1889, $580.33; and on June 7th, 1889, $320.11 (Defendant's "Exhibit 1-19," Rec. 39, Orig. 81; Rec. 136-137, Orig. 209, 211; Rec 131, Orig. 202; Rec. 135, Orig. 208), making $2,464.14 paid by Hansen to the Boyds after June 1st, 1889, for their advances in money for him on the transactions in question in this case. In the month of June, and just before said 40,000 bushels of June wheat were sold, James E. Boyd telegraphed Hanson telling him that his account was still behind, and asking for money or security (Rec. 62, Orig. 109; Rec. 64, Orig. 113).

Soon after Kirkbride & Co. had made to the Boyds the last one of the aforesaid payments, Hansen revoked his order, and directed them to pay no more money to the Boyds on his account, but to pay the residue directly to himself, which Kirkbride & Co. did. (Rec. 136, 137, Orig. 210-211.) On June 8th, 1889, said 40,000 bushels of June wheat was sold by the order of James E. Boyd (Rec. 62, Orig. 109; Defendant's "Exhibit 1-18," Rec. 38, Orig. 80). Said 40,000 bushels of June wheat which had been purchased on April 29th, 1889, at 82¼ cents per bushel, were sold on said June 8th, 1889, at 79 cents per bushel (Rec. 38, Orig. 80). After the Boyds had finally closed out on said June 8th all wheat that they were carrying for Hansen, he told Brush he hadn't the money, and could not pay them *then*, and before the wheat was finally closed out he told Brush that if they would give him time he would pay them all he owed (Rec. 96, Orig. 156). On June 10th, 1889, L. E. Murphy, as agent for the Boyds, delivered to Hansen a final statement of account (Defendant's "Exhibit 1-19," Rec. 39, Orig. 81), showing an indebtedness due from him to them of $18,248.36, a portion of which indebtedness arose from the aforesaid "change" of said 40,000 bushels of May wheat to a like quantity of June wheat, and the subsequent sale of the same on June 8th, 1889. Hansen took said statement of account, examined it, said it was larger than he had expected it would be, said he must have time to pay it, put it in his pocket, walked away, and said no more. He did not repudiate, or object to said statement of account, or any item thereof, or the sale of said 40,000 bushels of May wheat, or the purchase of said like amount of June wheat, or the sale of the same by the Boyds for him, nor did he question their authority to make for him said purchases or sales, nor in any way refer to or mention the same. (Defendant's "Exhibit 1-19," Rec. 39, Orig. 81; Rec. 104-105, Orig. 167-168; Rec. 110, Orig. 175; Rec. 138, Orig. 212.) On June 12th, 1889, this action was begun. (Rec. 7, Orig. 16.) On or about August 1st, 1889, Hansen had a conversation about this action with the witness, Handy, in which he admitted to Handy his indebtedness to the Boyds, which is the subject of this suit; admitted that he owed the Boyds the amount of money they had sued him for; made no claim that the transactions in question in this suit were fictitious; said he would have paid them if they had not sued him; said he was hard up, did not have the ready money, and if the Boyds would let him alone he would pay to them this indebtedness. (Rec. 28, Orig. 65.)

The statements of account, defendant's Exhibit 1-1 to 1-20, (Rec. 33-39, Orig. 71-83), were mailed, or delivered by the Boyds to Hansen on the day of their several dates, or on the next day at the farthest, and were always accepted by him. This was the usual and ordinary course of dealing between him and them (Rec. 44, Orig. 89). If Hansen was in Minneapolis, he received said statements of account on the day of their date; if he was not there they were sent to him at Benson by next mail, and he received them within two or three days of their date. (Rec. 113-117, Orig. 179-184).

B. The parts of the trial Court's charge contained in said ninth and fifteenth specifications of error are true in law.

1. There was as above shown, evidence in the case tending to show that the acts of the Boyds in transferring the 40,000 bushels of May wheat to a like quantity of June wheat, and in closing out the latter on June 8th, 1889, were *authorized* by Hansen.

2. There was, as above shown, evidence in the case tending to show that the acts of the Boyds in transferring said wheat from May to June, and in selling the same on June 8th, 1889, were *ratified* by Hansen; and it was the duty of the Court to instruct the jury as to the law upon the hypothesis of fact stated in said ninth and fifteenth specifications of error, and the law as there laid down is correct.

> (1). Ratification is one of the modes of constituting agency. "An act done *for another*, by a person not assum-" "ing to act for himself, but for such other person, though" "without any precedent authority whatever, becomes the" "act of the principal if subsequently ratified by him. In" "that case the principal is bound by the act, whether it be" "for his detriment or his advantage, and whether it be in" "tort or in contract, to the same extent as by and with" "all the consequences which flow from the same act done" "by his *previous* authority".
>
> *Wilson vs. Tumman, 6 M. & G. 236, 242, 243.*
> *Anson on Contracts (5th Eng. Ed.) 341.*

> (2). A principal who ratifies the acts done, or accepts a contract made on his behalf by one whom he thereby undertakes to regard as his agent, may make such ratification or signify his assent by words or by conduct.
>
> *Anson on Contracts (5th Eng. Ed.) p's 341, 342.*

By his words the principal may avow his responsibility for the acts of his agent, and thus ratify them.

There was, as above shown, evidence in this case tending to show that Hanson did, by his words, ratify the acts of the Boyds in transferring said wheat from May to June, and in selling the same on June 8th.

By his conduct, exhibiting itself either in positive acts, or in inaction, silence and acquiescence, the principal may ratify the acts of his agent.

Wharton Agency and Agents, Sec. 87.
Supervisors vs. Schenck, 5 Wall. 772.

(3.) A principal having the right to disaffirm acts of an agent must do it promptly, and if not done within a reasonable time, ratification will be presumed.

Indianapolis Rolling Mill Co. vs. R. R., 120 U. S. 256, 260.
Law vs. Cross, 1 Black 533.
Ward vs. Warfield, 3 La. Ann. 468.
Kelsey vs. Bank, 69 Penn. St. 426.
Maddux vs. Bevan, 39 Md. 485.
Story Agency, Sec. 258.
Prince vs. Clark, 1 B. & C. 186.

(4.) Where an agent has exceeded his authority, an intention to ratify will be presumed from the silence of the principal, after the latter has received a letter informing him what has been done.

Feild vs. Farrington, 10 Wall. 141.
Insurance Co. vs. McCain, 96 U. S. 84.
Ward vs. Warfield, 3 La. Ann. 468.
Prince vs. Clark, 1 B. & C. 186.

(5.) Whenever the usage of business and the course of trade requires prompt reply from a principal to an agent of an agent's report of his acts, silence on the part of the principal, after due notification of the agent's unauthorized act, may be considered as a ratification, whenever the principal has had a reasonable time and opportunity to reply.

Wharton on Agency and Agents, Sec. 86, and cases cited.
Meyer vs. Morgan, 51 Miss. 21.

(6.) When an agent acts, as he supposes for the best interest of a distant principal, it is the duty of the principal, when informed of the transaction, "to give immediate in-" "formation of his repudiation. He cannot, by holding his" "peace, and apparent acquiescence, have the benefit of the" "contract if it should afterwards turn out to be profitable," "and retain a right to repudiate it if otherwise."

Law vs. Cross, 1 Black 533, 539.
Insurance Co. vs. McCain, 96 U. S. 84.
Twin-Lick Oil Co. vs. Marbury, 91 U. S. 592, 593.
Meyer vs. Morgan, 51 Miss. 21.
Curcier vs. Ritter, 4 Wash. C. C. 549.
Prince vs. Clark, 1 B. & C. 186, 190.
Searing vs. Butler, 69 Ill. 575.
Foster vs. Rockwell, 104 Mass. 167.

(7). Where conduct is relied upon as constituting a ratification of unauthorized acts, the fact that the parties are principal and agent rather than strangers, and the fact of their ordinary course of dealing are important factors for consideration.

Feild vs. Farrington, 10 Wall. 141.
Foster vs. Rockwell, 104 Mass. 167.
Searing vs. Butler, 69 Ill. 575.

(8). Where a principal has been duly notified of his agent's unauthorized acts, done as the agent supposes for the best interest of his distant principal, and the usages of business and the ordinary course of dealing between them require prompt reply, and the principal does not disaffirm such acts, but keeps silent and acquiesces in them, thereby influencing the agent to his prejudice and misleading him, such silence and acquiescence, when the facts are clear and not in dispute, may, and upon the hypothesis of fact contained in said parts of the trial Court's charge, do raise a presumption in law of ratification of such acts by the principal.

Wharton on Agency and Agents, Sec. 87.
Maddux vs. Bevan, 59 Md. 485.
Story on Agency, Sec. 255, 258.

Bryant vs. Moore, 26 Me. 84.
Greenleaf on Evidence, Sec's. 27, 197.
Wiggins vs. Burkham, 10 Wall. 129.
Feild vs. Farrington, 10 Wall. 141, 148.
Laveland vs. Green, 40 Wis. 431.
Searing vs. Butler, 69 Ill. 575.
Meyer vs. Morgan, 51 Miss. 21.
Mobile Co. vs. Jay, 65 Ala. 113.

(9). When the facts are in dispute and the proofs are conflicting, the question of a principals ratification of his agents unauthorized acts is a mixed one of law and fact. "In such cases the Court should instruct the jury" "upon the several hyphothesis of fact insisted upon by" "the parties."

Wiggins vs. Burkham, 10 Wall. 129.

(10). If it be claimed that in that part of the trial Court's charge contained in the fifteenth specification of error the Court erroneusly submitted to the jury, upon the hypothesis of fact there stated, the question of Hansen's ratification of the acts of the Boyds in transferring said wheat from May to June, and in selling the same on June 8th, 1889,

"the error of the Court in submitting the question to the" "jury was therefore favorable to him and he has no right" "to complain."

Wiggins vs. Burkham, 10 Wall. 129, 133.
Law vs. Cross, 1 Black 533.

3. Said statements of account, Plaintiffs' "Exhibit M," and Defendant's "Exhibit 1-19", rendered by the Boyds to Hansen on April 29th and June 10th, respectively, and the several items thereof, and the acts of the Boyds with reference thereto, were each assented to as correct, and ratified by him, and said statements of account each became an account stated; and it was the duty of the trial Court to instruct the jury as to the law upon the hypothesis of fact stated in said ninth and fifteenth specifications of error, and the law as there laid down is correct.

(1). An account rendered is an account made out by the creditor and presented to the debtor for his examination and acceptance; and when accepted, it becomes an account stated.

Black's Law Dictionary.
Comyns Dig. Chan. 2A. 3. (vol. 2. p. 329).

(2). An account stated is an account, rendered by the creditor, and by the debtor assented to as correct, either expressly or by implication of law from his failure to object.

Black's Law Dictionary.
Toland vs. Sprague, 12 Peters 300.
1 Story's Equity, Sec. 526.
Sherman vs. Sherman, 2 Vernon 276.
Willis vs. Jernegan, 2 Atk. 251, 252.
Philips vs. Belden, 2 Edw. Ch. 1.

(3). The debtor's failure to object to an account rendered, or that silence on his part from which his assent to an account rendered will be implied, must continue beyond, or exceed what is called a reasonable time. The question, what is a reasonable time, is always one of law for the Court, where the facts are clear.

Wiggins vs. Burkham, 10 Wall. 129.
Toland vs. Sprague, 12 Peters 300.
1 Story's Equity Jurisprudence, Sec. 526.
Bartlett vs. Smith, 13 Fed. Rep. 263.
Edwards vs. Hoeffinghoff, 38 Fed. Rep. 635.
Oil Company vs. Van Etten, 107 U. S. 325, 334.
Lockwood vs. Thorne, 11 N. Y. 170.
Fleischner vs. Kubli, 20 Oregon 328.
Stevens vs. Ayers. 10 N. Y. Supp. 502.

(4.) Where the facts are in dispute and the proofs are conflicting, the question is a mixed one of law and fact. "In such cases the Court should instruct the jury" "upon the several hypotheses of fact insisted upon by the" "parties."

Wiggins vs. Burkham, 10 Wall. 129.

(5). Citation of authorities that an account rendered is by implication of law, assented to as correct by the debtor by his silence, or failure to object within a reasonable time:

An account was rendered by a creditor living at C., by sending the same by mail, May 16th, 1866, to debtors living at H., distant about 220 miles by railroad. Said debtors made no objection till on or about May 28th, 1866, when they addressed a letter by mail to the creditor objecting to some items of the account, but making no objection to others, to which latter items it did not appear that they ever objected until after commencement of suit. This Court *held:* If there were several posts between the time of the receipt of the account by the debtors, and the date of their letter objecting to it, the Court should have instructed the jury that their letter objecting was not within a reasonable time. The Court cited with approval 1 Story's Equity, Sec. 526, where a similar doctrine is declared.

Wiggins vs. Burkham, 10 Wall. 129.

"Between merchants at home, an account which has"
"been presented and no objection made thereto after the"
"lapse of several posts, is treated under ordinary circum-"
"stances as being by acquiescence a stated account. Be-"
"tween merchants in different countries, a rule founded in"
"similar considerations prevails. If an account has been"
"transmitted from one to the other, and no objection is"
"made after several opportunities of writing have oc-"
"curred, it is treated as an acquiescence in the correctness"
"of the account transmitted, and therefore it is deemed"
"a stated account."

1 Story Equity Jurisprudence, Sec. 526, and cases cited.

In an action upon an account stated, plaintiffs in England mailed to defendant in New York on January 4th, 1881, a statement of their mutual accounts. This was retained by defendant without objection until March 23rd, 1881, when he first raised objection. During this time defendant made payments on account. Held: Facts to make an account stated.

Samson vs. Freedman, 102 N. Y. 699.

(See also)

Mulford vs. Caesar, 53 Mo. App. 263.

1 Story Eq. Jur., Sec. 526 Supra, is cited with approval in

Brown vs. Vandyke, 8 N. J. Eq., 795, 801.
Ruffner vs. Hewitt, 7 W. Va. 585, 607.
Powell vs. Pacific R. R., 65 Mo. 658, 661.
Lockwood vs. Thorne, 11 N. Y. 172.

In conclusion: The defendants in error, in good faith, paid out, and advanced the money for the use of, and performed the services for, and at the request of, the plaintiff in error, alleged in their complaint; said money was advanced, and services performed by them for him, in making and executing contracts for the purchase and sale of grain, which were not wagering and illegal, but valid and legal contracts. He refused to repay to them said money, or to reward them for such services, to their great damage, in the sum of $19,099.50. These facts were found by an unbiased jury of exceptional intelligence, upon a fair trial in the Court below, and are fixed upon the record of this case. A motion for a new trial, ably argued by Counsel for plaintiff in error, was, after careful deliberation by the trial Court, denied. Said trial was had, early in the year 1890, at great expense to defendants in error. Meantime, witnesses have become scattered, and one important witness has died. After this lapse of time, reversal of judgment here would probably result in final defeat, and destruction of the rights of defendants in error to repayment of said money, and reward for said services. Error in law is alleged here; but a careful examination of the record discloses no substantial error in the rulings of the trial Court. Considering its charge to the jury, in its entirety, that charge conforms to the well settled law, and there can be no grounds for supposing that the jury was misled. In the words of the trial Court: "The evidence was somewhat" "conflicting, but it was fairly left to the jury to determine the intention" "of the parties, and the law correctly given by the Court." (Rec. 17, Orig. 44b.)

Defendants in error pray for affirmance of the judgment of the Court below.

RALPH WHELAN,
KOON, WHELAN & BENNETT,
Attorneys for Defendants in Error.

Supreme Court of the United States.

October Term, A. D. 1894.

No. 113.

THEODORE HANSEN,
Plaintiff in Error,

vs.

JAMES E. BOYD and SAMUEL BOYD,
Defendants in Error.

The Suggestion of the Death of Samuel Boyd,

and

Motion.

RALPH WHELAN,
Of Counsel for James E. Boyd, Defendant in Error.

In conclusion: The defendants in error, in good faith, paid out, and advanced the money for the use of, and performed the services for, and at the request of, the plaintiff in error, alleged in their complaint; said money was advanced, and services performed by them for him, in making and executing contracts for the purchase and sale of grain, which were not wagering and illegal, but valid and legal contracts. He refused to repay to them said money, or to reward them for such services, to their great damage, in the sum of $19,099.50. These facts were found by an unbiased jury of exceptional intelligence, upon a fair trial in the Court below, and are fixed upon the record of this case. A motion for a new trial, ably argued by Counsel for plaintiff in error, was, after careful deliberation by the trial Court, denied. Said trial was had, early in the year 1890, at great expense to defendants in error. Meantime, witnesses have become scattered, and one important witness has died. After this lapse of time, reversal of judgment here would probably result in final defeat, and destruction of the rights of defendants in error to repayment of said money, and reward for said services. Error in law is alleged here; but a careful examination of the record discloses no substantial error in the rulings of the trial Court. Considering its charge to the jury, in its entirety, that charge conforms to the well settled law, and there can be no grounds for supposing that the jury was misled. In the words of the trial Court: "The evidence was somewhat" "conflicting, but it was fairly left to the jury to determine the intention" "of the parties, and the law correctly given by the Court." (Rec. 17, Orig. 44b.)

Defendants in error pray for affirmance of the judgment of the Court below.

RALPH WHELAN,
KOON, WHELAN & BENNETT,
Attorneys for Defendants in Error.

Office Supreme Court U. S.
FILED.
MAR 30 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, A. D. 1894.

No. 113.

THEODORE HANSEN,
Plaintiff in Error,

vs.

JAMES E. BOYD and SAMUEL BOYD,
Defendants in Error.

The Suggestion of the Death of Samuel Boyd,

and

Motion.

RALPH WHELAN,
Of Counsel for James E. Boyd, Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

No. 113.

THEODORE HANSEN, Plaintiff in Error.

vs.

JAMES E. BOYD and SAMUEL BOYD, Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Notice of the Suggestion of the Death of Samuel Boyd, Defendant in Error, and of Motion.

SIR:—Please to take notice, that, upon the annexed affidavit of James E. Boyd, and of Ralph Whelan, with copies whereof you are herewith served, and upon the pleadings, proofs, bill of exceptions, files, record, and all the proceedings in this cause, and upon the transcript thereof from the Circuit Court of the United States for the District of Minnesota, at the October, A. D. 1895 term of this court, to be held and continued at the Capitol, in the city of Washington, District of Columbia, on Monday, the thirtieth day of March, A. D. 1896, at the opening of court on that day or as soon thereafter as counsel can be heard, the suggestion of the death of said Samuel Boyd, since the commencement of this cause in this court, and before this day, to-wit: on the twenty-eighth day of March, A. D. 1892, in the county of Los Angeles, state of California, will be made to this court; and this court will be moved:

1. That the suggestion of the death of the said Samuel Boyd be entered of record in this court.

2. That the writ of error in this cause thereafter stand against said James E. Boyd, as surviving partner of James E. Boyd, and Brother.

3. That that certain Order of this court in this cause, heretofore made and entered upon the second day of March, A. D. 1896, to the effect, to-wit: that if the said defendants in error remit in the trial court, within a time named, certain sums of money from their judgment in this cause, and produce and file a certified copy thereof in this court, said judgment, less the amount so remitted, will be affirmed, but otherwise reversed, the defendants in error in either event to pay the costs, be amended, by the insertion in said Order of the words: James E. Boyd, as surviving partner of James E. Boyd and Brother, in the place of the words: "James E. Boyd and Samuel Boyd," and also in the place of the words: "The defendants in error," wherever they occur in said Order.

4. That the time under said Order, as so amended, within which said James. E. Boyd, as surviving partner of James E. Boyd and Brother, shall be required to remit in the trial Court the sums of money in said Order named, and produce and file a certified copy thereof in this Court, to secure an affirmance of said judgment by this Court, be extended, and that, for that purpose, a reasonable time, during the present term of this Court, after the making and filing of such amended Order be granted unto him.

5. That this cause thereafter proceed solely against said James E. Boyd, as surviving partner of James E. Boyd and Brother, and that an entry of record to that effect be made.

6. That such other and further Order be made and entered, or relief granted, in the premises, as the practice and procedure of this Court shall require, and the justice of this cause demand.

Yours, &c.,

RALPH WHELAN,

Of Counsel for James E. Boyd, Defendant in Error.

Dated Minneapolis, March 23d, 1896.

To CHARLES E. FLANDRAU, of Counsel for Plaintiff in Error.

Due, and timely notice of the within Suggestion of Death, and Motion, and service thereof and of the within affidavits by copies, is hereby admitted; and it is by and between the parties to this cause

hereby stipulated and agreed, that the within Suggestion of Death, and Motion may be brought on for hearing, pursuant to the within Notice, before said Court, on Monday the 30th day of March, A. D. 1896, at the opening of Court on that day, without further or longer notice given to said plaintiff in error; and that any question of length, or timeliness of notice to him of the hearing of the within Suggestion of Death, or Motion, is hereby expressly waived by said plaintiff in error.

CHAS. E. FLANDRAU,
Of Counsel for Plaintiff in Error.

RALPH WHELAN,
Of Counsel for James E. Boyd, Defendant in Error.

Dated Minneapolis, March 23rd, 1896.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

No. 113.

THEODORE HANSEN, Plaintiff in Error,

vs.

JAMES E. BOYD and SAMUEL BOYD, Derendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Suggestion of the Death of Samuel Boyd, Defendant in Error, and Motion.

And now comes the said James E. Boyd, by Ralph Whelan, his attorney, and here gives the court to understand, and be informed, that since the commencement of this cause in this court, and before this day, to-wit: on the twenty-eighth day of March, A. D. 1892, in the County of Los Angeles, State of California, the said Samuel Boyd died, and the said James E. Boyd survived him, which the said Theodore Hansen does not deny, but admits to be true; and that since the making and entry, upon March 2nd, 1896, by this court of its certain Order of affirmance of judgment, on condition that the defendants in error remit certain items therefrom, and before this day, to-wit: on the eleventh day of March, A. D. 1896, information of the death of said Samuel Boyd was first received by said James E. Boyd, and by Ralph Whelan, his attorney aforesaid, and, towit: on the twenty-first day of March, A. D. 1896, actual knowledge of the death of said Samuel Boyd was first had by them or by either of them, all of which at large and fully appears in the affidavit of James E. Boyd, and of Ralph Whelan, heréto attached.

And, hereupon, the said James E. Boyd, by Ralph Whelan, his attorney aforesaid, comes, and upon the annexed affidavit of James E. Boyd, and of Ralph Whelan, and upon the pleadings, proofs, bill of

exceptions, files, record, and all the proceedings in this cause, and upon the transcript thereof from the Circuit Court of the United States for the District of Minnesota, hereby moves the Court:

1. That the suggestion of the death of the said Samuel Boyd be entered of record in this Court.

2. That the Writ of Error in this cause hereafter stand against said James E. Boyd, as surviving partner of James E. Boyd and Brother.

3. That that certain Order of this Court in this cause, heretofore made and entered upon March 2nd, 1896, to the effect, to-wit: That if the said defendants in error remit in the trial Court, within a time named, certain sums of money from their judgment in this cause, and produce and file a certified copy thereof in this Court, said judgment, less the amount so remitted, will be affirmed, but otherwise reversed, the defendants in error in either event to pay the costs, be amended, by the insertion in said Order of the words: James E. Boyd, as surviving partner of James E. Boyd and Brother, in the place of the words: "James E. Boyd and Samuel Boyd," and also in the place of the words: "The defendants in error," wherever they occur in said Order.

4. That the time under said Order, as so amended, within which said James E. Boyd, as surviving partner of James E. Boyd and Brother, shall be required to remit in the trial Court the sums of money in said Order named, and produce and file a certified copy thereof in this Court, to secure an affirmance of said judgment by this Court, be extended, and that, for that purpose, a reasonable time, during the present Term of this Court, after the making and filing of such amended Order be granted unto him.

5. That this cause hereafter proceed solely against said James E. Boyd, as surviving partner of James E. Boyd and Brother, and that an entry of record to that effect be made.

6. That such other, or further Order be made and entered, or relief granted, in the premises, as the practice and procedure of this Court shall require, and the justice of this cause demand.

RALPH WHELAN,

Of Counsel for James E. Boyd, Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

No. 113.

THEODORE HANSEN, Plaintiff in Error.

vs.

JAMES E. BOYD and SAMUEL BOYD, Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Affidavit of James E. Boyd.

STATE OF MINNESOTA, } ss.
COUNTY OF HENNEPIN. }

James E. Boyd, of Omaha, State of Nebraska, being first duly sworn, deposes, and says that he is a party to, and one of the defendants in error in the above entitled action. That he and the said Samuel Boyd, defendant in error in the above entitled action, were heretofore co-partners in trade, under the firm name and style of James E. Boyd & Brother, and engaged in trade in Chicago, Illinois, and in Minneapolis, Minnesota. That the judgment, of which the record and proceedings are under review in this court in the above entitled action, was obtained by, and belonged to this deponent and Samuel Boyd, as such co-partners, and arose out of an obligation, or indebtedness from said Theodore Hansen, plaintiff in error, to them, as such co-partners. That on or about the year A. D. 1890, said Samuel Boyd removed from Cook County, Illinois, where he had theretofore resided, to the the State of Washington, United States of America. That after his removal to said State, he wrote letters to, and communicated with this deponent very infrequently. That he did not answer communications by letter, sent to him by deponent, and at last ceased to write to, and to communicate with deponent altogether. That in the latter part of the year 1890, this deponent,

for the last time, received any communication, or in any way heard from said Samuel Boyd while he was yet living. That he then resided in Puyallup, in said State of Washington. That from said time, and until March 10th, A. D. 1896, this deponent was informed and believed, and had always supposed that said Samuel Boyd was living, and that he resided and continued to reside in said last named place. That on said last named date, deponent was informed that said Samuel Boyd no longer resided in said last named place, but had removed his residence to Los Angeles County, State of California. That on March 11th, 1896, this deponent was informed by telegraph that said Samuel Boyd was dead. That this was the first information of any kind, received by, or intimation made by any one to, this deponent of the death of said Samuel Boyd. That thereafter immediate steps were taken, and investigation had by this deponent to verify such information concerning Samuel Boyd's death, and to obtain positive knowledge of the same, and of the time and place thereof, if true. That this deponent spared no expense or labor to make, and did make such investigation with all possible speed, and thereafter obtained his first positive knowledge of the said Samuel Boyd's death, on March 21st, 1896, and no earlier,—that being the earliest possible date such positive knowledge of such death could have been obtained by this deponent, after he had obtained the first information thereof, at the time aforesaid. That on said 21st day of March, 1896, this deponent first knew that said Samuel Boyd was dead. That he died on March 28th, 1892, in said Los Angeles County, State of California. That a true copy of the official certificate of his death there, in the Pacific Branch, National Home for disabled Volunteer Soldiers, above the hand of H. E. Hasse, surgeon of said National Home, is hereto attached, marked "Exhibit A," and made a part hereof. That said Samuel Boyd's death was sudden and immediate, and among strangers, who had no knowledge of his previous history, or of the whereabouts of any of his friends and relatives, and particularly of this deponent. That said Samuel Boyd refused to inform, in any way, his relatives and friends, and particularly this deponent, that he had removed to, and had taken up his residence in said Los Angeles County, State of California, but sought to and did conceal the same from them, and each of them. That, as deponent is in-

formed and believes, said Samuel Boyd sought to, and did conceal from those persons whom he met in said last named place, and who were about him at the time of his death, all knowledge, and information of the names, and places of residence of his relatives and friends, and particularly of this deponent That after, and on account of the decision of the above entitled action by this court, deponent sought immediately to communicate with said Samuel Boyd with reference to said action, at the place where deponent supposed that said Samuel Boyd still resided, to-wit: at Puyallup, State of Washington, and thereafter deponent learned of said Samuel Boyd's death, as above set forth.

And this deponent does further say, that he is the sole, surviving partner of said co-partnership of James E. Boyd & Brother, by whom the judgment aforesaid was obtained, against Theodore Hansen, aforesaid. That neither said judgment, nor any part thereof, has ever been sold, transferred, or assigned by this deponent, or by said James E. Boyd & Brother, nor was the same, or any part thereof sold, transferred, or assigned by said Samuel Boyd in his life-time, to any third person or persons. That this deponent is not only entitled to the legal rights of a surviving partner of said co-partnership, as to said judgment, and the avails thereof, but also, upon a fair accounting as to said judgment and its avails, is equitably entitled to the whole of the same.

And deponent further says that he is informed, and believes, that said Samuel Boyd died intestate, and that no administrator of his estate has ever been appointed, and that there are not any personal representatives thereof.

And further deponent saith not.

JAMES E. BOYD.

Subscribed, and sworn to before me, this 23d day of March, A. D. 1896.

RALPH WHELAN,
Notary Public, Hennepin County, Minnesota.

[Notarial Seal.]

EXHIBIT A.

(Form No. 77.)

PACIFIC BRANCH, NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

MARCH 17th, 1896.

I hereby certify that the records of this Branch show that Samuel Boyd, late of "B" Co., 8th Regiment, Mo. Volunteers, was admitted on the 4th day of January, 1892. His disability at the date of admission, as appears by the records, was due to habitual dislocation of the right shoulder, and inguinal hernia, ~~which he alleges to have contracted in the service of the United States.~~

Medical history in this branch: He died March 28th, 1892. Death was sudden and immediate, due to rupture of an aneurism of the aorta.

H. E. HASSE,
Surgeon.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

No. 113.

THEODORE HANSEN, Plaintiff in Error,

vs.

JAMES E. BOYD and SAMUEL BOYD, Derendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Affidavit of Ralph Whelan.

STATE OF MINNESOTA, } ss.
COUNTY OF HENNEPIN. }

Ralph Whelan, of Minneapolis, State of Minnesota, being first duly sworn, deposes and says, that he is the attorney for said James E. Boyd, defendant in error in the above entitled action, and was the attorney for said Samuel Boyd, defendant in error in said action. That deponent is informed, and believes that said Samuel Boyd died on March 28th, A. D. 1892, in Los Angeles county, State of California. That neither this deponent, nor the said James E. Boyd had, or had received any information, or intimation even, that said Samuel Boyd was not living, but was dead, until the 11th day of March, A. D. 1896. That thereafter, and on said last named day this deponent, and said James E. Boyd, took immediate steps to verify the truth of such information, so received, concerning the death of said Samuel Boyd. That neither this deponent, nor the said James E. Boyd had, or had received any positive knowledge of the death of said Samuel Boyd, until the 21st day of March, A. D. 1896. That said last named day was the earliest possible day, on which positive knowledge of the death of said Samuel Boyd was, or could have been receivedby them, or either of them, after the first infor-

mation concerning such death was received by them, on said March 11th, 1896.

And further deponent saith not.

RALPH WHELAN.

Subscribed, and sworn to before me this 23d day of March, A. D. 1896.

ADELBERT R. TAYLOR,
Notary Public, Hennepin County, Minnesota.

(Notarial Seal.)

POINTS, AND AUTHORITIES, IN SUPPORT OF MOTION.

1. At the time of Samuel Boyd's death, this court had jurisdiction of this cause.

Samuel Boyd died March 28, 1892. (Affidavit of James E. Boyd, and of Ralph Whelan.)

The citation, writ of error, and supersedeas bond in this cause, were each served on opposing counsel, and filed in the office of the clerk of the court below, on December 11, 1890, and said bond was approved by the trial judge, on December 10, 1890. (Rec. Fols. 1-9.)

Draper vs. Davis, 102 U. S. 370.
Kitchen vs. Randolph, 93 U. S., 86.

2. On Samuel Boyd's death, this cause of action survived to his co-defendant in error, James E. Boyd.

Revised Statutes of the United States, Sec. 956.
McKinney vs. Carroll, 12 Pet. 66.
Moses vs. Wooster, 115 U. S. 285.
Martin vs. R'y Co., 151 U. S. 703.
1 Chitty Pleadings, pages 19, 50.
2 Tidd's Practice, Ch. 44, pages 1163, 1164.
Lilly's Entries, page 217.

3. The personal representatives of Samuel Boyd need not be made parties to this cause.

McKinney vs. Carroll, 12 Pet. 66.
Moses vs. Wooster, 115 U. S. 285.

4. This cause should proceed against James E. Boyd, as surviving partner of James E. Boyd and Brother, and an entry of record in this court to that effect should be made.

Moses vs. Wooster, 115 U. S. 285.
McKnutt vs. Bland, 2 How. 9, 28.

President, &c. of Bank vs. Weisiger, 2 Pet. 481, (found in Book VII. page 492, of Edition of Reports of United States Supreme Court, published by The Lawyers Co-operative Publishing Co.)
Clay vs. Smith, 3 Pet, 411.

To enable this cause to proceed to judgment in this Court, and to secure affirmance of the judgment in the trial Court, the defendants in error must remit certain items from said judgment; such is the order of this Court. The Order of March 2d, 1896, should, therefore, be amended, as in this motion prayed, to enable such remittitur to be made by James E. Boyd, as surviving partner of James E. Boyd and Brother.

RALPH WHELAN,
Of Counsel for James E. Boyd, Defendant in Error.

Suggestion, on Part of Plaintiff in Error, in Opposition to the Granting of Defendant in Error's Motion.

Counsel for plaintiff in error, while admitting the sufficiency of the proof of the death of Samuel Boyd at the date of his death, as suggested in the motion papers, and being willing that the record should be corrected by his death being suggested thereon, at the date of the making of this motion, and admitting that the cause of action survives in favor of James E. Boyd, the surviving partner, I claim that the argument having been made in this court, and the decision rendered by this court partly against both plaintiffs, and partly against the defendant Hansen, after the death of said Boyd, both the argument and the decision thereon go for naught, and when the record is corrected by the suggestion of the death of one of the plaintiffs, the plaintiff in error should have the right to re-argue the case, as if no previous argument had been made, and the court should render a new decision thereon.

CHAS. E. FLANDRAU,
Of Counsel for Plaintiff in Error,
in Opposition to this Motion.